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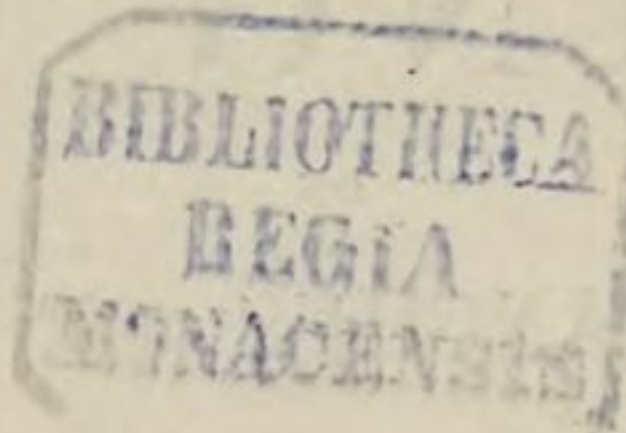
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ADDENDA.



P. 26, line 9 from bottom,

Asfar v. Blundell, (1896) 1 Q. B. 123, C. A.

P. 59, line 5,

Add, See also, as to the right to rescind, *Lynde v. Anglo-Italian
Hemp Spinning Co.*, (1896) 1 Ch. 178.

CUTTER v. POWELL.

TRINITY.—35 GEO. 3.

[REPORTED 6 T. R. 320. (3 R. R. 185.)]

If a sailor hired for a voyage take a promissory note from his employer for a certain sum provided he proceed, continue, and do his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed either on the contract or on a *quantum meruit*.

To *assumpsit* for work and labour done by the intestate, the defendant pleaded the general issue. And at the trial at Lancaster the jury found a verdict for the plaintiff for 31*l.* 10*s.*, subject to the opinion of this court on the following case:—

The defendant, being at Jamaica, subscribed and delivered to T. Cutter, the intestate, a note, whereof the following is a copy: “Ten days after the ship ‘Governor Parry,’ myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues, and does his duty, as second mate, in the said ship from hence to the port of Liverpool. Kingston, July 31st, 1793.” The ship “Governor Parry” sailed from Kingston on the 2nd August, 1793, and arrived in the port of Liverpool on the 9th October following. T. Cutter went on board the ship on the 31st July, 1793, and sailed in her on the 2nd August, and proceeded, continued, and did his duty as second mate in her from Kingston until his death, which happened on the 20th September following, and before the ship’s arrival in the port of Liverpool. The usual wages of a second mate of a ship on such a voyage, when shipped by the month out and home, is 4*l.* *per* month; but when seamen are shipped by the run from Jamaica to England a gross sum is usually given. The usual length of a voyage from Jamaica to Liverpool is about eight weeks.

This was argued last term by *J. Haywood* for the plaintiff, but the court desired the case to stand over, that inquiries might be made relative to the usage in the commercial world on these

kinds of agreements. It now appeared that there was no fixed settled usage (*a*) one way or the other: but several instances were mentioned as having happened within these two years, in some of which the merchants had paid the whole wages under circumstances similar to the present, and in others a proportionable part. The case was now again argued by

Chambre for the plaintiff, and *Wood* for the defendant.

Arguments for the plaintiff. — The plaintiff is entitled to recover a proportionable part of the wages on a *quantum meruit*, for work and labour done by the intestate during that part of the voyage that he lived and served the defendant; as in the ordinary case of a contract of hiring for a year, if the servant die during the year, his representatives are entitled to a proportionable part of his wages. If any defence can be set up against the present claim, it must arise either from some known general rule of law respecting marine service, or from the particular terms of the contract between these parties. But there is no such rule applicable to marine service in general as will prevent the plaintiff's recovering, neither will it be found, on consideration, that there is anything in the terms of this contract to defeat the present claim. It is indeed a general rule that freight is the mother of wages (*b*); and therefore if the voyage be not performed, and the owners receive no freight, the sailors lose their wages; though that has some exceptions where the voyage is lost by the fault of the owners, as if the ship be seized for a debt of the owners, or on account of having contraband goods on board: in either of which cases the sailors are entitled to their wages, though the voyage be not performed; *Vin. Abr., Mariners*, 235. But here the rule itself does not apply, the voyage having been performed, and the owners having earned their freight. There is also another general rule, that if a sailor desert he shall lose his wages (*c*); but that is founded upon public policy, and was introduced as a means of preserving the

(*a*) See the notes to *Wigglesworth v. Dallison*, *ante*, vol. i., p. 535.

(*b*) See, on that subject, *Appleby v. Dods*, 8 East, 300; *The Neptune*, 1 Hag. Adm. 227. The right of seamen to wages no longer depends on the earning of freight; see the Merchant Shipping Act, 1894

(57 & 58 Vict. c. 60), s. 157. The rule mentioned in the text never applied to the wages of the master; *Hawkins v. Twizell*, 5 E. & B. 883.

(*c*) See *Edward v. Trevellick*, 4 E. & B. 59.

ship. But that rule cannot apply to this case; for there the sailor forfeits his wages by his own wrongful act, whereas here the seaman was prevented completing his contract by the act of God. So if a mariner be impressed, he does not forfeit his wages; for in *Wiggins v. Ingleton* (d) Lord Holt held that a seaman, who was impressed before the ship returned to the port of delivery, might recover wages *pro tanto*. Neither is there anything in the terms of this contract to prevent the plaintiff's recovering on a *quantum meruit*. The note is a security, and not an agreement; it is in the form of a promissory note, and was given by the master of the ship to the intestate to secure the payment of a gross sum of money, on condition that the intestate should be able to, and should actually, perform a given duty. The condition was inserted to prevent the desertion of the intestate, and to ensure his good conduct during the voyage. And in cases of this kind the contract is to be construed liberally. In *Edwards v. Child* (e), where the mariners had given bonds to the East India Company not to demand their wages unless the ship returned to the port of London, it was held that as the ship had sailed to India, and had there delivered her outward-bound cargo, the mariners were entitled to their wages on the outward-bound voyage, though the ship was taken on her return to England. This note cannot be construed literally, for then the intestate would not have been entitled to anything, though he had lived and continued on board during the whole voyage, if he had been disabled by sickness from performing his duty. But even if this is to be considered as a contract between the parties, and the words of it are to be construed strictly, still the plaintiff is entitled to recover on a *quantum meruit*, because that contract does not apply to this case. The note was given for a specific sum to be paid in a given event; but that event has not happened, and the action is not brought on the note. The parties provided for one particular case: but there was no express contract for the case that has happened; and therefore the plaintiff may resort to an undertaking which the law implies, on a *quantum meruit* for work and labour done by the intestate. For though, as the condition in the note, which may be taken to be a condition precedent, was not complied with, the plaintiff

(d) 2 Ld. Raym. 1211.

(e) 2 Vern. 727.

cannot recover the sum which was to have been paid if the condition had been performed by the intestate, there is no reason why the representative of the seaman, who performed certain services for the defendant, should not recover something for the work and labour of the intestate, in a case to which the express contract does not apply.

Arguments on behalf of the defendant.—Nothing can be more clearly established than that where there is an express contract between the parties they cannot resort to an implied one. It is only because the parties have not expressed what their agreement was, that the law implies what they would have agreed to do had they entered into a precise treaty; but when once they have expressed what their agreement was, the law will not imply any agreement at all. In this case the intestate and the defendant reduced their agreement into writing, by the terms of which they must now be bound. This is an entire and indivisible contract; the defendant engaged to pay a certain sum of money, provided the intestate *continued* to perform his duty during the whole voyage; that proviso is a condition precedent to the intestate or his representative claiming the money from the defendant, and, that condition not having been performed, the plaintiff cannot now recover anything. If the parties had entered into no agreement, and the intestate had chosen to trust to the wages that he would have earned and might have recovered on a *quantum meruit*, he would only have been entitled to 8*l.*; instead of which, he expressly stipulated that he should receive 30 guineas if he continued to perform his duty for the whole voyage. He preferred taking the chance of earning a large sum, in the event of his continuing on board during the whole voyage, to receiving a certain, but smaller, rate of wages for the time he should actually serve on board; and having made that election, his representative must be bound by it. In the common case of service, if a servant who is hired for a year die in the middle of it, his executor may recover part of his wages in proportion to the time of service (*f*); but if the servant agreed to receive a larger sum than the ordinary rate of wages, on the express condition of his serving the whole year, his

(*f*) The old law was otherwise; see *Labourers*, pl. 48; *Id. Contract*, pl. 31; *Bro. Abr., Apportionment*, pl. 13; *Id.* and *Worth v. Viner*, 3 *Vin. Abr.*, 8, 9.

executor would not be entitled to any part of such wages in the event of the servant dying before the expiration of the year. The title to marine wages by no means depends on the owners being entitled to freight; for if the sailors desert, or do not perform their duties, they are not entitled to wages, though the owners earn the freight. Nor is it conclusive against the defendant that the intestate was prevented fulfilling his contract by the act of God; for the same reason would apply to the loss of a ship, which may equally happen by the act of God and without any default in the sailors; and yet in that case the sailors lose their wages. But there are other cases that bear equally hard upon contracting parties, and in which an innocent person must suffer, if the terms of his contract require it; *e.g.*, the tenant of a house who covenants to pay rent, and who is bound to continue paying the rent though the house be burned down (*g*). [Lord KENYON, C. J.—But that must be taken with some qualification: for where an action was brought for rent after the house was burned down, and the tenant applied to the Court of Chancery for an injunction, L. C. Northington said that if the tenant would give up his lease he should not be bound to pay the rent (*h*).] With regard to the case cited from 2 L. Raym., the case of a mariner impressed is an excepted case, and the reason of that decision was founded on principles of public policy.

Lord KENYON, C. J.—I should be extremely sorry that, in the decision of this case, we should determine against what has been the received opinion in the mercantile world on contracts of this kind, because it is of great importance that the laws, by which the contracts of so numerous and so useful a body of men as the sailors are supposed to be guided, should not be overturned. Whether these kind of notes are much in use among the seamen we are not sufficiently informed; and the instances now stated to us from Liverpool are too recent to form anything like usage. But it seems to me at present that the decision of this case may proceed on the particular words of this contract and the precise facts here stated, without touching marine

(*g*) See *Belfour v. Weston*, 1 T. R. 310.

(*h*) See *Brown v. Quilter*, Ambl. 619. This doctrine is, however, now over-

ruled; *Hare v. Groves*, 3 Anst. 687; *Holtzapffel v. Baker*, 18 Ves. 115; see *Bullock v. Dommitt*, 6 T. R. 650; *Izon v. Gorton*, 5 B. N. C. 501.

(Lord KENYON, C.J.)

contracts in general. That where the parties have come to an express contract none can be implied, has prevailed so long as to be reduced to an axiom in the law. Here the defendant expressly promised to pay the intestate 30 guineas, provided *he proceeded, continued and did his duty* as second mate in the ship from Jamaica to Liverpool; and the accompanying circumstances disclosed in the case are, that the common rate of wages is 4*l.* per month, when the party is paid in proportion to the time he serves, and that this voyage is generally performed in two months. Therefore, if there had been no contract between these parties, all that the intestate could have recovered on a *quantum meruit* for the voyage would have been 8*l.*; whereas here the defendant contracted to pay 30 guineas, provided the mate continued to do his duty as mate during the whole voyage, in which case the latter would have received nearly four times as much as if he were paid for the number of months he served. He stipulated to receive the larger sum if the whole duty were performed, and nothing unless the whole of that duty were performed: it was a kind of insurance. On this particular contract my opinion is formed at present; at the same time I must say that, if we were assured that these notes are in universal use, and that the commercial world have received and acted upon them in a different sense, I should give up my own opinion.

ASHHURST, J.—We cannot collect that there is any custom prevailing among merchants on these contracts; and therefore we have nothing to guide us but the terms of the contract itself. This is a written contract, and it speaks for itself. And as it is entire, and as the defendant's promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive anything under it. It has been argued, however, that the plaintiff may now recover on a *quantum meruit*; but she has no right to desert the agreement; for wherever there is an express contract the parties must be guided by it, and one party cannot relinquish or abide by it as it may suit his advantage. Here the intestate was, by the terms of his contract, to perform a given duty, before he could call upon the defendant to pay him anything: it was a condition precedent without performing

which the defendant is not liable. And that seems to me to conclude the question: the intestate did not perform the contract on his part; he was not indeed to blame for not doing it; but still, as this was a condition precedent, and as he did not perform it, his representative is not entitled to recover.

GROSE, J.—In this case the plaintiff must either recover on the particular stipulation between the parties, or on some general known rule of law, the latter of which has not been much relied upon. I have looked into the laws of Oleron; and I have seen a late case on this subject in the Court of Common Pleas, *Chandler v. Greaves* (i). I have also inquired into the practice of the merchants in the city, and have been informed that these contracts are not considered as divisible, and that the seaman must perform the voyage, otherwise he is not entitled to his wages; though I must add that the result of my inquiries has not been perfectly satisfactory, and therefore I do not rely upon it. The laws of Oleron are extremely favourable to the seaman; so much so that, if a sailor, who has agreed for a voyage, be taken ill and put on shore before the voyage is completed, he is nevertheless entitled to his whole wages, after deducting what has been laid out for him. In *Chandler v. Greaves*, where the jury gave a verdict for the whole wages to the plaintiff, who was put on shore on account of a broken leg, the court refused to grant a new trial, though I do not know the precise grounds on which the court proceeded. However, in this case the agreement is conclusive; the defendant only engaged to pay the intestate on condition of his continuing to do his duty on board during the whole voyage; and the latter was to be entitled either to 30 guineas or to nothing, for such was the contract between the parties. And when we recollect how large a price was to be given in the event of the mate continuing on board during the whole voyage, instead of the small sum which is usually given *per* month, it may fairly be considered that the parties themselves understood that if the whole duty were performed the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage. That seems to me to be the situation in which the mate chose to put himself; and as the condition

(i) Hil. 32 G. 3, C. B. : see 2 H. Bl. 606, n.

(GROSE, J.)

was not complied with, his representative cannot now recover anything. I believe, however, that in point of fact these notes are in common use, and perhaps it may be prudent not to determine this case until we have inquired whether or not there has been any decision upon them.

LAWRENCE, J.—If we are to determine this case according to the terms of the instrument alone, the plaintiff is not entitled to recover, because it is an entire contract. In 1 Salk. 65 (*k*), there is a strong case to that effect; there, debt was brought upon a writing by which the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him 100*l.* *per annum* for his service; the plaintiff showed that the defendant's testator died three-quarters of a year after, during which time he served him, and he demanded 75*l.* for three quarters: after judgment for the plaintiff in the Court of Common Pleas, the defendant brought a writ of error, and it was argued that without a full year's service nothing could be due, for that it was in nature of a condition precedent; that it being one consideration and one debt, it could not be divided: and this court were of that opinion, and reversed the judgment. With regard to the common case of a hired servant, to which this has been compared, such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year. So, if the plaintiff in this case could have proved any usage that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether on the terms of the contract itself, she cannot recover anything. As to the case of the impressed man (*l*), perhaps it is an excepted case; and I believe that in such cases the king's officers usually put another person on board to supply the place of the impressed man during the voyage, so that the service is still performed for the benefit of the owners of the ship.

Postea to the defendant,

(*k*) *Plymouth v. Throgmorton*.

(*l*) See *ante*, p. 3.

unless some other information relative to the usage in cases of this kind should be laid before the court before the end of this term : but the case was not mentioned again.

FEW questions are of so frequent occurrence, or of so much practical importance, and at the same time so difficult to solve, as those in which the dispute is, whether an action can be brought by one who has entered into a special contract, part of which remains unperformed.

Subject of note.

We find it laid down in the treatises, that, in certain cases, the performance of, or readiness to perform, one side of the contract is a condition precedent to the right to demand performance of the other side. And rules are given in the text-books for the purpose of enabling us to distinguish these cases from another class, in which no such condition exists, but the contractors are bound by mutual independent covenants or promises; see the notes to *Pordage v. Cole*, 1 Wms. Saund. 319 l, and *Peeters v. Opie*, 2 Id. 346, ed. 1845 (1 Id. 548, 2 Id. 742, ed. 1871).

Sometimes performance or readiness to perform a condition precedent to right of action.

We find it also laid down, that no action of *indebitatus assumpsit*, or upon a *quantum meruit*, can be brought for anything done under a special agreement which remains open; *Gordon v. Martin*, Fitzgibb. 303; *Hulle v. Heightman*, 2 East, 145; but that, where the terms of the special agreement have been performed on one side, and nothing is to be done upon the other but a money payment, such payment may be enforced by an action of *indebitatus assumpsit*; *Cooke v. Munstone*, 1 B. P. N. R. 351; *Alcorn v. Westbrook*, 1 Wils. 115; *Clutterbuck v. Coffin*, 3 M. & Gr. 842; see *Bianchi v. Nash*, 1 M. & W. 545; and *per Tindal, C.J.*, in *Grissell v. Robinson*, 3 B. N. C. 10, cited in *Scott v. Parker*, 1 Q. B. 810, where it was held that the non-performance of a stipulation, not being a condition precedent to repayment, was no objection to an action of *indebitatus assumpsit* for money lent.

No action on common counts for something done under special contract which remains open.

We also find that there are some cases in which work has been done, or goods supplied, under a special agreement, but not in conformity thereto, and yet the payment of a compensation is enforced by action, because the defendant has retained and enjoyed the benefit of that which actually was done; *Farnsworth v. Garrard*, 1 Campb. 38; *per Parke, J.*, *Read v. Rann*, 10 B. & C. 438.

Work done under special contract not in conformity thereto.

Where contract being still open one party rescinds it and sues on *quantum meruit*.

And lastly, there are cases in which, even while the special contract remains open, one party has been permitted to put an end to it, and to sue for what has been already done under it upon a *quantum meruit*; *Withers v. Reynolds*, 2 B. & Ad. 882; *Planché v. Colburn*, 8 Bing. 14; *Prickett v. Badger*, 1 C. B. N. S. 296.

There is no difficulty in finding cases referable to each of the above classes, but the real difficulty is to determine, when a case occurs in practice, to which of them it is referable. In the present note it will be attempted to deduce from the decisions a few rules, likely to prove useful in the resolution of such a difficulty.

When action may be brought by party to special contract while his own side remains unperformed.

The question it is proposed to discuss is as follows:—*In what cases may an action be brought, by a person who has entered into a special contract, against the person with whom he has contracted, while his own side of the contract remains unperformed?* And, since there is a distinction in the nature of the actual rights of parties to contracts, which was well defined by the now obsolete forms of action of *special* and *indebitatus assumpsit*, it is still convenient for purposes of analysis to subdivide the above question into two branches:—

When on special contract.

1. In what cases might the action have been brought in *special assumpsit*, or, in other words, upon the contract itself?

When *indebitatus assumpsit*.

2. In what cases might it have been brought in *indebitatus assumpsit*?

The latter question will be considered below (p. 16). The former question it would be wrong to discuss here at length, because it has been treated by Serjeant Williams in that clear and satisfactory style which distinguished his writings, in the notes to *Pordage v. Cole*, 1 Wms. Saund. 319 l, and *Peeters v. Opie*, 2 Id. 346. The result of the elaborate discussion contained in those notes is as follows:—

Result of discussion on first point in Williams' Saunders.

There are some special contracts in which the promises upon the one side are dependent on the promises upon the other side, so that no action can be maintained for non-performance of the former, without showing that the plaintiff has performed, or at least has been ready, if allowed, to perform the latter, the performance of or readiness to perform which is said to be *a condition precedent* to his right of action. Of this description was the contract in *Morton v. Lamb*, 7 T. R. 125, cited 2 Wms. Saund. 352 c, where the declaration averred that, in consideration that the plaintiff

Where promises on each side are dependent, performance or readiness to perform is a

had bought of the defendant 200 qrs. of wheat *at a certain price*, the defendant undertook to deliver it at a certain place in one month from the sale, and that the plaintiff was always, for one month from the sale, ready and willing to receive the wheat, but the defendant did not deliver it. After verdict, the judgment was arrested, on the ground that the declaration ought to have averred that the plaintiff was ready and willing to pay the stipulated price upon delivery; and the court said that, where two concurrent acts were to be done, the party who sues the other for non-performance must aver that he has performed or was ready to perform his own part of the contract. In such cases as that just cited, the matters to be done upon each side are said to be *concurrent acts*, because by right they ought to be done at the same time; and a readiness to perform his own side of the contract is a *condition precedent* to the right of either contractor to sue. Thus, in agreements for the sale of real property, where one party agrees to convey, and the other to pay the price, the vendor cannot sue for the money without showing that he was ready to convey; nor the vendee for a refusal to convey, without showing a readiness to pay the money; *Glazebrook v. Woodrow*, 8 T. R. 366.

condition precedent to action.

There are other cases in which one contractor must show a readiness to perform his part before he can sue, but the other need not; thus, in the case cited in *Morton v. Lamb*, where a party was to pull down a wall and *then* to be paid for it, the pulling down was a condition precedent to the right to enforce payment, but a readiness to pay was not a condition precedent to the right to oblige the defendant to commence the work; see *Coombe v. Greene*, 11 M. & W. 480.

Cases where one party only need show readiness.

Other cases there are in which neither of the contractors is subjected to any condition precedent to his right to enforce performance by the other of his part: but the promises on each side are independent of what is to be done upon the other. Such was the case in *Campbell v. Jones*, 6 T. R. 570, where A. agreed, in consideration of a sum of money, to teach B. a particular method of bleaching for which A. had a patent, and to allow B. to exercise that method during the continuance of the patent right. It was held that A. might sue for the money, though he had not instructed B., who might on his side, if he pleased, sue for the neglect to instruct him. In these cases, the *promises* on the one side, not the performance of those promises, are the considera-

Where promises independent, performance not a condition precedent to right of either party.

tion for the promises upon the other side. In the former cases of *concurrent acts* and *conditions precedent*, the consideration is the *performance*, not the promise; Hobart, 106; see *Franklin v. Miller*, 4 A. & E. 599; *Corrall v. Cattell*, 4 M. & W. 734 (followed in *Re Scott & Alvarez*, (1895) 2 Ch. 603); *Wilks v. Smith*, 10 M. & W. 355; *Lister v. Loble*, 7 A. & E. 124, where the point arose on the construction of a local Act; and *Fearon v. Aylesford*, 14 Q. B. D. 792.

Question in each case to be determined by looking to intention of the parties.

The question whether the acts stipulated for in a given contract are concurrent, or whether performance, or readiness to perform, upon either side, is a condition precedent to the right to enforce performance on the other, is to be solved not by any technical rules, but by ascertaining, if possible, the intention of the parties; 1 T. R. 645. In order to discover that intention, the following rules are laid down by Serjeant Williams, 1 Wms. Saund. 320, *in notis* :—

Serjeant Williams' rules for ascertaining intention of parties.

Rule 1.

1. "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, before the thing, which is the consideration of the money or other act, is to be performed, an action may be brought for the money, or for not doing such other act, *before* performance: for it appears that the party relied upon his *remedy*, and did not intend to make the performance a condition precedent: and so it is where no time is fixed for the performance of that which is the consideration of the money or other act;" see *Mattock v. Kinglake*, 10 A. & E. 50; and *Wilks v. Smith*, 10 M. & W. 355, where, upon an agreement to sell land for a sum to be paid at the end of four years, and interest in the meantime half-yearly, it was held that the declaration for an instalment of the interest need not contain an averment of readiness to convey; see also *Alexander v. Gardner*, 1 B. N. C. 671; *Hall v. Bainbridge*, 5 Q. B. 233; *Howden v. Simpson*, 10 A. & E. 793; *Pistor v. Cater*, 9 M. & W. 315; *Judson v. Bowden*, 1 Exch. 162; *Jowett v. Spencer*, Id. 647; *Dicker v. Jackson*, 6 C. B. 103, where the delivery of an abstract of title by the vendor to the vendee according to the terms of the conditions of sale was held not to be a condition precedent to the vendor's right to sue for the purchase-money.

But although "the day for the payment of money," &c., "*may*," according to the letter of the contract, "happen before the thing which is the consideration of the money or other act is to be performed," still, if it can be gathered from the whole instrument that the intention of the parties

was that the performance of a particular act should be a condition precedent to the right to be paid the money, performance must be averred and proved. In *Roberts v. Brett*, 18 C. B. 561, 6 C. B. N. S. 611, 11 H. L. C. 337, the plaintiff contracted to *forthwith* procure a ship and to do certain other things, the defendant contracting to pay 1,000*l.* within seven days after the ship's arrival at M. wharf. There was a stipulation that bonds for securing the performance of the contract should be given by each party within ten days from the date of the contract, and delivery of his bond was held a condition precedent to the plaintiff's right to be paid the 1,000*l.*; for, although the seven days from the ship's arrival at M. wharf might expire before the ten days within which the bond was to be given, the parties clearly intended that the delivery of the bonds should be a security to each side for the performance of the contract, and as such was a condition precedent to the right of *either* party to sue upon it. "Forthwith" was construed to mean within a reasonable time, having regard to all that was to be done by both parties.

2. "When a day is appointed for the payment of money, Rule 2. &c., and the day is to happen *after* the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance;" see *Glaholm v. Hays*, 2 M. & Gr. 257; *Mathews v. Taylor*, Id. 667; *Lucas v. Godwin*, 3 B. N. C. 737; *Porcher v. Gardner*, 8 C. B. 461; *Staunton v. Wood*, 16 Q. B. 638; *Grafton v. Eastern Counties R. Co.*, 8 Exch. 699. In *Neale v. Ratcliff*, 15 Q. B. 916, the defendants, who were tenants to the plaintiff of certain premises, agreed to keep them in repair, "*the same being first put into good tenantable repair*" by the plaintiff. The action was brought for non-repair, and the declaration alleged that the plaintiff had before breach put the premises in repair. He had in fact put only part of the premises in repair, *but that part had not been left in repair by the defendants*. The court held that the repairing by the plaintiff was a condition precedent to the defendants' obligation to repair (see *Coward v. Gregory*, L. R. 2 C. P. 153) and that on this contract the condition could not be divided, so that the plaintiff, not having repaired the whole, could not recover in respect of the non-repair of any part; as to which latter point, see *Kingdom v. Cox*, 5 C. B. 522; *Rolt v. Cozens*, 18 C. B. 673. See, as to conditions precedent in leases and in farming and mining contracts, Conditions precedent in leases;

in sales of
realty ;

in charter-
parties ;

in building
contracts ;

in guarantee
policy.

Rule 3.

When promise
goes only to
part of con-
sideration.

Cannock v. Jones, 3 Exch. 233, 5 Id. 713, 3 H. L. C. 700 ; *Friar v. Grey*, 15 Q. B. 891, 901, 5 Exch. 584, 4 H. L. C. 565 ; *Clarke v. Westrope*, 18 C. B. 765 ; *Bristol v. Jones*, 1 E. & E. 484 ; *Tidey v. Mollett*, 16 C. B. N. S. 298 ; *Bastin v. Bidwell*, 18 Ch. D. 238 ; *Williams v. Brisco*, 22 Id. 441 ; *Edge v. Boileau*, 16 Q. B. D. 117 ; in contracts for the sale of real property, *Dicker v. Jackson*, 6 C. B. 103 ; *Manby v. Cremonini*, 6 Exch. 808 ; of personalty, *Woolfe v. Horne*, 2 Q. B. D. 355 ; *Bowes v. Shand*, 2 App. Cas. 455 ; in charterparties, *Ollive v. Booker*, 1 Exch. 416 ; *Oliver v. Fielden*, 4 Id. 135 ; *Rae v. Hackett*, 12 M. & W. 724 ; *Thompson v. Gillespy*, 5 E. & B. 209 ; *Hudson v. Bilton*, 6 Id. 565 ; *Tarrabochia v. Hickie*, 1 H. & N. 183 ; *Behn v. Burness*, 1 B. & S. 877, 3 Id. 751 ; *Pust v. Dowie*, 5 B. & S. 20, 33 ; *MacAndrew v. Chapple*, L. R. 1 C. P. 643 ; *Corkling v. Massey*, 8 Id. 395 ; *Jackson v. Union Marine Ins. Co.*, 10 Id. 125 ; *Tully v. Howling*, 2 Q. B. D. 182 ; *Inman Co. v. Bischoff*, 7 App. Cas. 670 ; in bills of lading, *Duthie v. Hilton*, L. R. 4 C. P. 138 ; in building contracts, *Morgan v. Birnie*, 9 Bing. 672 ; *Lamprell v. Billericay Union*, 3 Exch. 283 ; *Roberts v. Bury I. C.*, L. R. 5 C. P. 310 ; *Jones v. St. John's College*, L. R. 6 Q. B. 115 ; in a guarantee policy, *London Guarantee Co. v. Fearnley*, 5 App. Cas. 911.

3. "When a covenant or promise goes only to part of the consideration, and a breach thereof may be paid for in damages, it is an independent covenant or promise. And an action may be maintained for the breach of it by the defendant without averring performance, or readiness, in the declaration." Such was the case in *Stavers v. Curling*, 3 B. N. C. 355, which is a very strong example, for there the defendant's promises were expressed in the contract to be performable "on the performance" of the plaintiff's, and were yet held to have been intended to be, and to be, independent. See also *Franklin v. Miller*, 4 A. & E. 599 ; *Wilks v. Smith*, 10 M. & W. 355 ; *Glaholm v. Hays*, 2 M. & Gr. 257 ; and *Scott v. Parker*, 1 Q. B. 809, where it was decided that, in the case of a loan stipulated to be repaid, with an agreement that securities deposited should be returned upon repayment, the return of the securities was neither a concurrent act nor a condition precedent. See further, *Galloway v. Jackson*, 3 M. & Gr. 960 ; *Fishmongers' Co. v. Robertson*, 5 Id. 131 ; *Macintosh v. Mid. R. Co.*, 14 M. & W. 548 ; *Christie v. Borelly*, 7 C. B. N. S. 561 ; *Seeger v. Duthie*, 8 Id. 45 ; *Newson v. Smythies*, 28 L. J. Ex.

97; *Neill v. Whitworth*, L. R. 1 C. P. 684; *Jeston v. Key*, 6 Ch. 610; *Simpson v. Crippin*, L. R. 8 Q. B. 14; *Roper v. Johnson*, L. R. 8 C. P. 167. In *Bettini v. Gye*, 1 Q. B. D. 183, a breach by the plaintiff, an opera singer, of a stipulation to be in London for rehearsals six days before the commencement of his engagement, was held no bar to his suing the defendant on the latter's refusal to engage him; but compare *Poussard v. Spiers*, 1 Q. B. D. 410, where the plaintiff's inability to appear at the earlier of certain stipulated performances was held to go to the root of the contract.

4. "When the mutual promises or covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred;" see *Atkinson v. Smith*, 14 M. & W. 695.

Rule 4.

When mutual promises go to whole consideration.

5. "When two acts are to be done *at the same time*, as when A. covenants to convey an estate to B. on such a day and, in consideration thereof, B. covenants to pay A. a sum of money *on the same day*, neither can maintain an action without averring a performance of, or an offer to perform, his own part, though it is not certain which of them is obliged to do the first act; and this particularly applies to cases of sale;" see *Stephens v. De Medina*, 4 Q. B. 422, recognised in *Bowlby v. Bell*, 3 C. B. 284; *Marsden v. Moore*, 4 H. & N. 500; *Bankart v. Bowers*, L. R. 1 C. P. 484; *Paynter v. James*, 2 Id. 348; and the Sale of Goods Act, 1893, s. 28. It may be added that there is a large class of cases in which, though no condition be *expressed*, the lapse of a reasonable time is an *implied* condition precedent to the right of action, and the performance of such condition ought still to be averred; *Sansom v. Rhodes*, 6 B. N. C. 261; *Stavart v. Eastwood*, 11 M. & W. 197; *Granger v. Dacre*, 12 Id. 431; *per Maule, J., Startup v. Macdonald*, 2 M. & Gr. 395.

Rule 5.

When two acts are to be done at same time.

The authorities on which these rules depend are discussed in the notes by Serjeant Williams above referred to, 1 Wms. Saund. 320, 2 Id. 346, ed. 1845. It is proper to add that, when it was laid down that *performance of a concurrent act must be averred*, the meaning of that was, that the plaintiff must have averred in his declaration that he was *ready and willing* to perform his part of the contract; see *Hannuic v. Goldner*, 11 M. & W. 849, and *Granger v. Dacre*, 12 Id. 431, where, the plaintiff having declared on an agreement to *accept goods within a reasonable time* after

Averment of readiness and willingness.

notice, the declaration was held bad for not averring that he was himself *during such reasonable time* ready to deliver them; see also *Jackson v. Allaway*, 6 M. & Gr. 942; *Boyd v. Lett*, 1 C. B. 222; *Giles v. Giles*, 9 Q. B. 164; *Armitage v. Insole*, 14 Id. 728; *Duthie v. Hilton*, L. R. 4 C. P. 138. The averment of the plaintiff's readiness and willingness to perform his part of the contract is proved by showing that he called on the defendant to accomplish his; *Wilks v. Atkinson*, 1 Marsh. 412; *Levy v. Herbert*, 7 Taunt. 314; *Pickford v. Grand Junction R. Co.*, 8 M. & W. 372.

Not necessary to aver performance of conditions precedent when defendant had incapacitated himself from performing his part.

It was not, however, necessary in any case to aver the performance of conditions precedent when the declaration showed that the defendant had absolutely incapacitated himself from performing his part of the contract; *Lovelock v. Franklyn*, 8 Q. B. 371; *Bradley v. Benjamin*, 46 L. J. Q. B. 590; and see, as to averring the waiver of conditions precedent, *Ripley v. McClure*, 4 Exch. 345; *Doogood v. Rose*, 9 C. B. 132; *Cort v. Ambergate R. Co.*, 17 Q. B. 127; *Hochster v. De La Tour*, 2 E. & B. 678.

General averment under C. L. P. Act, 1852.

By s. 57 of the C. L. P. Act, 1852, averment of the performance of conditions precedent might be made generally, and the opposite party was not allowed to deny such averment generally, but was bound to specify the conditions precedent, the performance of which he contested; see *Bentley v. Dawes*, 9 Exch. 666; and *Wood v. Copper Miners' Co.*, 17 C. B. 561.

Averment now implied.

By R. S. C. 1883, O. XIX., r. 14, no averment of the performance of conditions precedent is necessary, but an averment of their performance is implied in the pleading of the party for whose case it is necessary; and the opposite party must specify any condition precedent the performance of which he intends to contest.

When will action on common counts lie while special contract remains open?

The next branch of the question proposed at the beginning of this note is—In what cases would an action of *indebitatus assumpsit*, or, as it was usually called after the omission from the declaration of any averment of a promise, an action upon the *common counts*, have lain, while the special contract remained open? This is a question of great practical importance. And as the distinctions it involves are more than usually fine, and the authorities numerous, an attempt will be made to classify them, and deduce from them one or two general rules.

The meaning of this question really is, "When may it be said that, although the plaintiff has not performed his part of

the contract, there is nevertheless, in contemplation of law, a debt due from the defendant to the plaintiff, in respect of what the plaintiff has done under the contract?" When this debt arose out of a new contract inferred from the conduct of the parties, as, for instance, where the benefit of something done under, but not in accordance with, the contract had been accepted, it became properly recoverable under what were called the common counts, and therefore, though the late compendious system of pleading has been abolished, the question to be determined in each case is still the same, and must be tested by the same rules.

When will
action on
common
counts lie
while special
contract re-
mains open?

On the other hand, when the party suing has not departed from the terms of the special contract at all, but has been ready to do all that the parties intended he should do, his action is properly said to be brought upon the special contract itself. In ascertaining what was the intention of the parties, which must be gathered from the instrument itself, nice questions necessarily arise as to what are or are not conditions precedent to the right to sue, but these questions do not depend on mere subtleties of pleading, they are questions of fact which must be answered at some stage in the investigation before a decision as to whether a right of action exists can be arrived at.

It is submitted, therefore, that the pleading test which has been adopted as the basis of this note, resting as it does upon a logical analysis of the cause of action in each case, is not only the simplest and most exact, but is still, under a looser system of pleading, as practically useful as heretofore. It is none the less important to ascertain exactly what a plaintiff's rights are, although those rights may no longer be lost through inexactness of statement by the pleader at the outset of the case.

In the first place, then, there is a large class of cases which establish the general proposition, that while a special contract remained open, *i.e.*, unperformed, the party whose part of it was unperformed could not sue in *indebitatus assumpsit* to recover compensation for what he had done, until the whole was completed. This principle was acted on in *Cutter v. Powell*; it was also the ground of the decision in *Hulle v. Heightman*, 2 East, 145, a decision of considerable celebrity, which is said in the judgment to have proceeded on the authority of *Weston v. Downes*, 1 Dougl. 23 a; but *Weston v. Downes* belongs to a somewhat different class of cases; the action was there brought to recover back the

General rule,
no action on
common
counts lies by
party whose
part of special
contract is un-
performed.

Hulle v.
Heightman
discussed.

price of a horse in consequence of a breach of warranty ; so that it was not an attempt to obtain compensation for work done, or goods delivered, under a special contract ; but to recover money paid on a consideration alleged to have failed, and this the plaintiff, having accepted the horse, was not allowed to do. *Weston v. Downes* therefore belongs to the same class as *Street v. Blay*, 2 B. & Ad. 456, which is a leading case on that subject, and differs from *Hulle v. Heightman*, where the action was, not for money had and received to recover back cash paid on a consideration which had failed, but for work and labour done under a special contract which had been only in part performed. In that case a seaman sued for wages. He proved that he served on board the defendant's ship from Altona to London, and that on reaching London, as the defendant refused to give the seamen victuals and bade them go on shore, saying he could get plenty of their countrymen to go back for their victuals only, he accordingly went on shore, and, when some days later the defendant required him to return on board, he refused to do so, saying he had the law of him. The defendant put in the articles of agreement under which the plaintiff served, which showed that he was hired from Altona to London and back, and contained a special clause by which the plaintiff agreed to demand no wages till the end of the voyage. Upon these facts, Le Blanc, J., nonsuited the plaintiff, *on the ground that the special contract remained open and unrescinded*, and that the plaintiff should have sued on it, and not in *indebitatus assumpsit* ; and the King's Bench approved of that ruling.

Unqualified
refusal by one
party gives
other a right
to rescind con-
tract and sue

The principle on which *Hulle v. Heightman* was decided has never since been questioned. Assuming the special contract to have remained open and unrescinded, the plaintiff was undoubtedly bound to sue on it, and not in *indebitatus assumpsit*. Whether the court was right in assuming that the special contract *did*, after what had taken place, remain open and unrescinded, is a very different question, and upon that question it is submitted that the argument of Mr. Gibbs was correct, when he contended that the special contract had been put an end to, and that the plaintiff had a right to treat it as having never existed, and to sue for his labour on a *quantum meruit*. It is further submitted that it is an invariably true proposition, that, wherever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract,

or has disabled himself from performing it by his own act, the other party has, thereupon, a right to elect to rescind it, and may, on doing so, *immediately* sue on a *quantum meruit* for anything which he had done under it before the rescission. This, it is apprehended, is established by *Withers v. Reynolds*, 2 B. & Ad. 882; *Planché v. Colburn*, 8 Bing. 14; *Franklin v. Miller*, 4 A. & E. 599; *Prickett v. Badger*, 1 C. B. N. S. 296; *Inchbald v. Western Neilgherry Co.*, 17 Id. 733; and other cases cited and commented upon below. Now, in *Hulle v. Heightman*, the defendant had refused to perform his part of the contract, and the plaintiff had, by bringing his action on a *quantum meruit*, elected to rescind. It is submitted, therefore, that *Hulle v. Heightman*, so far as it assumes that the special contract remained open, would not now be supported; unless, indeed, it can be supported upon the ground that the question whether the defendant's acts amounted to an absolute unqualified refusal to perform his part of the contract was a question which ought to have been left to the jury, and that, as the plaintiff's counsel did not require that it should be left to them, he must be taken to have acquiesced in the opinion of Le Blanc, J., that the circumstances did not amount to a rescission.

on *quantum meruit*.

Suggested explanation of *Hulle v. Heightman*.

On the same principle with *Hulle v. Heightman* proceeded *Ellis v. Hamlin*, 3 Taunt. 52; *R. v. Whittlebury*, 6 T. R. 464; *Spain v. Arnott*, 2 Stark. 256; *Turner v. Robinson*, 6 C. & P. 15; *Ridgway v. Hungerford Market Co.*, 3 A. & E. 171 (which latter were cases of servants discharged *for cause*, before the expiration of their year); *Jesse v. Roy*, 1 C. M. & R. 316; and *Sinclair v. Bowles*, 9 B. & C. 92, which is, perhaps, more often cited than any other case upon this subject. It was an action of *assumpsit* for work and labour and materials, and for goods sold. It appeared that the plaintiff had repaired three chandeliers for the defendant, and that 5*l.* was a reasonable price for the work and materials; but it was also proved that the plaintiff, when he accepted the job, expressly agreed to *make them complete*, which he had failed to do, for 10*l.* Parke, J., nonsuited the plaintiff, giving him leave to move to enter a verdict for 5*l.*; but the court refused the rule, on the ground that the contract was entire, and that the plaintiff, not having completed his part, had no right to recover anything.

Sinclair v. Bowles.

Agreement to make chandeliers complete for 10*l.*

The effect of this case was discussed in *Roberts v. Havelock*, 3 B. & Ad. 404. That was an action for work and

Roberts v. Havelock.

Contract to put ship in thorough repair.

materials; the plaintiff, a shipwright, had engaged to put the defendant's ship *into thorough repair*; before this had been completed, the plaintiff demanded payment for what he had already done, and refused to finish the job without. The defendant refused payment, and thereupon this action was brought; and, a verdict having been found for the plaintiff, the defendant moved to set it aside, on the ground that the special contract was still open. The court refused the motion. "I have no doubt," said Lord Tenterden, "that the plaintiff was entitled to recover. In *Sinclair v. Bowles*, the contract was *to do a specific work for a specific sum*. There is nothing in this case amounting to a contract to do the whole repairs and make no demand till they are completed."

Semble, performance of whole work not a condition precedent to the payment of any part of price unless sum to be paid and work both specified.

From these words it may be thought that his lordship's judgment proceeded on the ground that the performance of *the whole work* is not to be considered a condition precedent to the payment of *any part of the price*, excepting when the sum to be paid and the work to be done are both specified (unless, of course, in case of special terms in the agreement expressly imposing such condition); and certainly good reasons may be alleged in favour of such a doctrine; for when the price to be paid is a specified sum, as in *Sinclair v. Bowles*, it is clear that the court and jury can have no right to apportion that which the parties themselves have treated as entire, and to say that it shall be paid in instalments, contrary to the agreement, instead of in a round sum as provided by the agreement; but, where no price is specified, this difficulty does not arise, and perhaps the true and right presumption is, that the parties intended the payment to keep pace with the accrual of the benefit for which payment is to be made.

Secus, where, though price specified, consideration is indivisible.

This, of course, can only be where the consideration is itself of an apportionable nature, for it is easy to put a case in which, though no price has been specified, yet the consideration is of so indivisible a nature that it would be absurd to say that one part should be paid for before the remainder; as, where a painter agrees to draw A.'s likeness, it would be absurd to require A. to pay a rateable sum on account when half the face only had been finished: it is obvious that he has then received no benefit, and never will receive any unless the likeness should be perfected. There are, however, cases (*e.g.*, *Roberts v. Havelock*) where the consideration is in its nature apportionable, and there, if no

entire sum has been agreed on as the price of the entire benefit, it would not be unjust to presume that the intention of the contractors was that the remuneration should keep pace with the consideration, and be recoverable *toties quoties* by action on a *quantum meruit*.

This position (besides what is said by Lord Tenterden) is perhaps somewhat countenanced by *Withers v. Reynolds*, 2 B. & Ad. 882. That was *assumpsit* for not delivering straw according to the following agreement: "R. undertakes to supply W. with wheat straw delivered at his premises till the 24th June, 1830, at 33s. *per* load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight; and W. agrees to pay R. 33s. *per* load for each load so delivered from this day to the 24th June, 1830, according to the terms of this agreement." It appeared that the plaintiff had refused to pay for the straw *upon delivery*, and it was contended that he was not bound to do so, and that, as no time was named for payment, he might defer it till the expiration of the contract, or that, at all events, the promises to deliver and to pay were independent, and should be enforced by cross actions; but the court held that the defendant had a right to be paid *toties quoties* on the delivery of each load, and that the plaintiff's refusal to do so entitled the defendant to rescind the contract, and that the plaintiff was therefore properly nonsuited. Such are the arguments in favour of the doctrine at which Lord Tenterden seems to hint in *Roberts v. Havelock*. The expressions, however, of Parke, J., in that very case, lean the other way. "If," said his lordship, "there had been any specific contract by the plaintiff *for completing the work*, the argument of the defendant might have had much weight. But this was only a general employment of the plaintiff by the defendant, in the same way as all shipwrights are employed." Yet surely if the plaintiff had refused to *complete* on payment as he went along, an action would have lain against him. In *Withers v. Reynolds*, Taunton, J., expressly founded the decision upon the special wording of the contract, "for *each* load," &c., which he said, imports that each load shall be paid for on delivery; and, indeed, if that case were decided on any other ground, it would be contrary to the opinion expressed by Parke, J., in *Oxendale v. Wetherell*, 9 B. & C. 386; and see *Button v. Thompson*, L. R. 4 C. P. 330.

*Withers v.
Reynolds.*

The contract of a solicitor, who is retained in a common Contract of

solicitor
retained in
action.

law action, is a special contract to carry it on to its termination, and if, before its termination, he refuses to act further he cannot recover his costs, unless he has so refused for good cause and has given reasonable notice to his client; *Underwood v. Lewis*, (1894) 2 Q. B. 306, and the cases there cited.

Read v. Rann,
claim for com-
mission when
bargain went
off.

To return from this digression. In *Read v. Rann*, 10 B. & C. 438, recognised in *Broad v. Thomas*, 7 Bing. 99, the doctrine of *Cutter v. Powell*, *Hulle v. Heightman*, and *Sinclair v. Bowles*, was again acted upon. In that case a ship-broker brought an action for commission for procuring a charterer for the defendant's ship. It was proved to be a custom in the City that, in such cases, if the bargain was perfected, the commission was five per cent., but if the bargain went off, nothing was payable; and here it had gone off. The plaintiff was nonsuited. "The claim of the plaintiff," said Parke, J., "rests on the custom, and not on a *quantum meruit*. The custom presupposes a special contract, and, if that is not satisfied, no claim at all arises, for no other contract can be implied. In some cases, a special contract not executed may give rise to a claim in the nature of a *quantum meruit*; e.g., where a special contract has been made for goods, and goods sent not according to the contract have been retained by the party, there a claim for the value on a *quantum valebant* may be supported; but then from the circumstances a new contract may be implied."

Where party
having right
to insist on
performance of
special con-
tract has
accepted no
benefit from
partial per-
formance.

Abortive
efforts to sell
advowson.

But no claim in the nature of a *quantum meruit* can be founded upon a special contract which has not been performed, unless the person who has a right to insist on its performance has accepted some benefit resulting from its partial performance, or the circumstances are such as to show, in some other way, that a new contract has arisen between the parties. For instance, if A. agree to pay B. a sum of money if he will sell for him an advowson, and the original contract be that the money is to be paid *on the sale*, and there is nothing in it from which it can be implied that B. is to be paid for abortive attempts to sell, and nothing has occurred to show that a new contract has arisen, B. cannot, if the sale does not take place, claim remuneration under a *quantum meruit* for the work actually done in the attempt to sell; although, if the sale has been prevented by a wrongful revocation of B.'s authority, an action will lie against A. for his wrongful act; *Simpson v. Lamb*, 17 C. B. 603; and, if the bargain goes off through

the default of the principal, the agent who has performed his part of the contract is entitled to his whole commission; *Green v. Lucas*, 33 L. T. 584; *Fisher v. Drewett*, 48 L. J. Ex. 32; see *Prickett v. Badger*, 1 C. B. N. S. 296, 308. As to when an agent's authority may be revoked, and the consequences which result from the revocation, see *Smart v. Sandars*, 3 C. B. 380, 5 Id. 895; *Taplin v. Florence*, 10 Id. 744; *Campanari v. Woodburn*, 15 Id. 400.

Revocation of agent's authority.

Nor, as is obvious, will any action lie on a *quantum meruit* for services rendered in anticipation of a special contract, which is, after all, not entered into, there being no intention that such services shall be paid for. *Harrison v. James*, 7 H. & N. 804, was a case of this class: a verbal agreement had been made that the defendant's son should go on trial to the plaintiff's house, and if the parties were satisfied should be afterwards apprenticed to the plaintiff. The son remained some time with the plaintiff on trial, and was boarded and lodged by him, but the intended apprenticeship went off, and the son left the plaintiff's house. It was held that the plaintiff could not recover for the board and lodging during the period when the son had been in his house; for it was clear, under the circumstances, that the parties never meant that the board and lodging were to be paid for.

Services rendered in anticipation of special contract not entered into.

The general rule being thus established, *viz.* that while the *special contract* remained unperformed no action of *indebitatus assumpsit* could be brought for anything done under it, we now come to the exceptions from that rule; and the first of them is that adverted to by Parke, J., in *Read v. Rann*, in the passage above cited. It consists of cases in which something has been done under a special contract, but not in strict accordance with the terms of that contract. In such a case the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration for it. Still, if the other party have derived any benefit from his labour, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such remuneration as the benefit conferred upon him is reasonably worth, and, to recover that *quantum* of remuneration, an action of *indebitatus assumpsit* was maintainable. This is conceived to be a just expression of the rule of law, which still prevails. The cases on the subject are, however, extremely numerous, and

Exceptions to rule that while special contract unperformed no action lies on common counts.

First exception where work has been done under contract, but not in strict accordance therewith, and other party has derived benefit from it.

in many instances at variance with each other; and, as the subject is one of great general importance, it will perhaps be best to enter somewhat more at large upon it, even at the risk of prolixity.

Old rule, that when anything was done under contract, stipulated price must be paid and cross action brought for deficiency.

The rule which was in early times observed upon this subject was diametrically opposite to that which now obtains. It was held that, whenever anything was done under a special contract, but not in conformity thereto, the party for whom it is done must pay the stipulated price, and resort to a cross action to indemnify himself for the deficiency in the consideration. Thus it was held, in *Broom v. Davis*, 1794, cited 7 East, 480 n., that the plaintiff, who had agreed to build a race-booth for twenty guineas, was entitled to recover the whole price, although the booth was so badly built that it fell down during the races, and it was admitted that a cross action would lie against the plaintiff. In *Templer v. M'Lachlan*, Feb. 6, 1806, 2 B. & P. N. R. 136, an action was brought on an attorney's bill, and the defence was gross negligence in the plaintiff, who had allowed improper bail to justify. The evidence of negligence was held inadmissible, and the plaintiff recovered the whole amount of his bill; the court saying that the only case in which such evidence would be admissible was where the negligence was so great that the plaintiff had derived *no benefit at all*, and that there they would perhaps admit it, to prevent circuitry. In *Mills v. Bainbridge*, cited 2 B. & P. N. R. 136, injury from improper stowage was held to be no defence in an action for freight.

Varied by *Basten v. Butler*.

However, in T. T. 46 G. 3 (June 13, 1806), the rule which now obtains was established by the decision of the K. B. in *Basten v. Butler*, 7 East, 479. That was an action of *assumpsit* for work and labour, and materials, brought by a carpenter, whom the defendant had employed to roof a barn. The defendant offered to prove that the work had been done in a grossly improper manner. This evidence was rejected on the authority of *Broom v. Davis*, and a verdict found for the plaintiff, which the court set aside on the ground that the defence ought to have been admitted.

Farnsworth v. Garrard.

This decision was followed by *Farnsworth v. Garrard*, 1 Camp. 38, which was also an action of *assumpsit* for work and labour, and materials, brought by the plaintiff, who had rebuilt the front of a house for the defendant. The defence was that the house was rebuilt so much out of the perpendicular that it was in danger of falling. Parke, for

the plaintiff, objected that this was only ground for a cross action; and he relied on *Templer v. M'Lachlan*. Lord Ellenborough admitted the evidence. "This action," said his lordship, "is founded on a claim for meritorious service: the plaintiff is to recover *what he deserves*. It is, therefore, to be considered how much he deserves, or if he deserves anything. If the defendant has derived no benefit from his services, he deserves nothing, and there must be a verdict against him. There was formerly considerable doubt upon this point. The late Buller, J., thought—and I, in deference to so great an authority, have, at times, ruled the same way—that, in cases of this kind, a cross action for the negligence was necessary; but that, if the work be done, the plaintiff must recover for it. *I have since had a conference with the judges on the subject, and I now consider this as a correct rule: that if there has been no beneficial service there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand. The claim shall be co-extensive with the benefit.*"

*Per Lord
Ellenborough.*

This case was followed by *Denew v. Daverell*, 3 Camp. 451, where the same rule was applied in an action by an auctioneer against his employer; see too *Bracey v. Carter*, 12 A. & E. 373; *Nicholls v. Wilson*, 11 M. & W. 107; *Hill v. Featherstonhaugh*, 7 Bing. 569; *Shaw v. Arden*, 9 Id. 287; *Gill v. Lougher*, 1 Tyr. 121; *Huntley v. Bulwer*, 6 B. N. C. 111; *Cox v. Leech*, 1 C. B. N. S. 617; and *Long v. Orsi*, 18 C. B. 610, where this rule was applied in actions brought by attorneys to recover from their clients the costs of abortive proceedings at law. *Poulton v. Lattimore*, 9 B. & C. 259, and *Street v. Blay*, 2 B. & Ad. 456, established, beyond all doubt, that, even where there was an express warranty, and a breach of that warranty was the defect of consideration complained of, the defendant might, in an action for goods sold and delivered, give evidence of the breach of warranty in reduction of damages; see *Dicken v. Neale*, 1 M. & W. 556; and this might have been done under the general issue; *Hill v. Allen*, 2 M. & W. 283. As to the further extension of this principle by the Judicature Act, 1873, see below.

Costs of abortive legal proceedings.

Evidence of breach of warranty admissible in reduction of damages.

In *Francis v. Baker*, 10 A. & E. 642, it was attempted to stretch this principle so far as to include a case in which a broker, who had purchased shares for the defendant, sued for money paid, and the latter set up as his defence conversion of the shares by the broker: the court, however, held that that was matter for a cross action. It will be observed

that the distinction between that case and the others is that the defence there was not the inferiority of the article procured by the broker, or the badness of his work, but a subsequent independent tort. However, in *Mondel v. Steel*, 8 M. & W. 858, 871, the court said that there were exceptions to the practice of allowing the defence of the inferiority of the thing done to that contracted for to be applied in reduction of damages; and they intimated that in actions on an attorney's bill, or for freight, the defence would not be allowed, unless it went to the extent of denying that any benefit at all had been derived. See, however, the distinction taken in *Hill v. Featherstonhaugh*, between a useless item severable from the rest of an account, and one inseparable.

Rule that where there has been no beneficial service there shall be no pay, not applicable to claim of freight for goods damaged in carrying.

In *Dakin v. Oxley*, 15 C. B. N. S. 646, attempt was made to push very far, and to apply to a totally distinct class of cases, the rule laid down by Lord Ellenborough in *Farnsworth v. Garrard*, that "*where there has been no beneficial service there shall be no pay.*" In *Dakin v. Oxley*, a shipowner sued a charterer for the freight of coals, and the latter pleaded that owing to the unskilfulness of the master in the navigation of the ship, the coals were so damaged on the voyage that on their arrival at the port of discharge they were of less value than the freight, and were abandoned to the shipowner. This plea admitted, as will be observed, that the goods arrived *as coals*, and were of some value. The Court of Common Pleas refused, in a judgment which exhausted the subject, to uphold this defence, and laid down distinctly that by the law of England "where goods have arrived, though damaged, the freight is payable by the ordinary terms of the charter-party; and the question of fortuitous damage must be settled with the underwriters, and that of culpable damage, in a distinct proceeding for such damage against the ship, captain, or owners;" see also *Robinson v. Knights*, L. R. 8 C. P. 465; *Merchant Shipping Co. v. Armitage*, L. R. 9 Q. B. 99; *Asfar v. Blundell*, (1895) 1 Q. B. 196. In a similar case, there might now be a counter-claim under the Judicature Acts for the damage; see below, p. 31.

Three courses open to vendee where warranty broken;

may refuse to receive article;

Independently of the Judicature Acts, it was settled by *Street v. Blay*, and *Poulton v. Lattimore*, that, where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may pursue. 1. He may refuse to receive the article at all: the power to pursue this first course, however, not extending to

cases where there has been a warranty upon the sale of a *specific chattel*, and where, the property passing by the contract, it is not competent to the vendee to rescind it without the vendor's consent, or a stipulation to that effect; see the observations in *Dawson v. Collis*, 10 C. B. 523; *Parsons v. Sexton*, 4 Id. 899. 2. He may receive it, and bring a cross action for the breach of the warranty; or, 3. He may, without bringing a cross action, use the breach of warranty in reduction of the damages, in an action brought by the vendor for the price; *i.e.*, to the extent of the difference between the agreed price or alleged value, and the real value at the time of delivery as reduced by the breach of contract; but if there be any further damage, besides that so allowed in abatement of the price, he must bring a cross action; *Mondel v. Steel*, 8 M. & W. 858; see *Rigge v. Burbidge*, 15 Id. 598; *Davis v. Hedges*, L. R. 6 Q. B. 687.

may bring cross action; may use breach in reduction of damages;

but for further damage must bring cross action.

By the Sale of Goods Act, 1893, a buyer "is not by reason only of a breach of warranty entitled to reject the goods; but he may (a) set up against the seller the breach of warranty in diminution or extinction of the price; or (b) maintain an action against the seller for damages for the breach of warranty" (s. 53).

Sale of Goods Act, 1893. 56 & 57 Vict. c. 71.

It was once thought, and indeed laid down by Lord Eldon in *Curtis v. Hannay*, 3 Esp. 82, that the vendee might, on discovering the breach of warranty, rescind the contract, return the chattel, and, if he had paid the price, recover it back. This doctrine, which was opposed to *Weston v. Downes*, *ante*, p. 17, was, however, overruled by *Street v. Blay*, and *Gompertz v. Denton*, 1 C. & M. 207; and it is clear that, though the non-compliance with the warranty may, where the property has not passed, justify the vendee in refusing to receive the chattel, it will not justify him in returning it, and suing to recover the price; *Foster v. Smith*, 18 C. B. 156; unless, indeed, he return it, having kept it (as he has a right to do, see *Lorrymer v. Smith*, 1 B. & C. 1) such a time only as was necessary for a fair examination, in which case he cannot be considered as having received it at all; see *Okell v. Smith*, 1 Stark. 107; *Jordan v. Norton*, 4 M. & W. 155; *Street v. Blay*, 2 B. & Ad. 456; *Young v. Cole*, 3 B. N. C. 730, where a distinction was drawn between the effect of a breach of warranty, and of a total failure of consideration; see also *Gompertz v. Bartlett*, 2 E. & B. 849; *Gurney v. Womersley*, 4 Id. 133; and the Sale of Goods Act, 1893, ss. 34, 53.

Opinion that on discovering breach vendee could rescind contract and return chattel or recover price. Overruled.

Probably the distinction between a *condition* and a *warranty* as pointed out by Williams, J., in *Dawson v. Collis*, 10 C. B. 530, will be found to obviate any difficulty that may be supposed to exist, in deciding what are the cases in which a vendee can refuse to accept, or can return the article, and either resist payment of the price, or recover it back if paid.

Warranty collateral only.

A warranty, properly so called, can only exist where the subject-matter of the sale is ascertained and existing, so as to be capable of being inspected at the time of the contract, and is a collateral engagement that the specific thing so sold possesses certain qualities; but, the property passing by the contract of sale (*Dixon v. Yates*, 5 B. & Ad. 313; *Gilmour v. Supple*, 11 Moo. P. C. 551), a breach of the warranty cannot entitle the vendee to rescind the contract, and revest the property in the vendor, without his consent; the vendee must therefore resort to an action for such breach, or give it in evidence in reduction of the price, or as an answer to the action if the breach renders the article wholly worthless.

Breach cannot therefore entitle vendee to rescind contract.

Distinction between warranty and condition as to things unascertained.

But where the subject-matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted; see *Nichol v. Godts*, 10 Exch. 191; *Josling v. Kingsford*, 13 C. B. N. S. 447; *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447; per Williams, J., *Dawson v. Collis*, 10 C. B. 530; per Lord Blackburn, *Bowes v. Shand*, 2 App. Cas. 455; per Lord Abinger, *Chanter v. Hopkins*, 4 M. & W. 399; *Barr v. Gibson*, 3 Id. 390, 399; *Gompertz v. Bartlett*, 2 E. & B. 849; *Lucy v. Mouflet*, 5 H. & N. 229; *Behn v. Burness*, 3 B. & S. 756; per Blackburn, J., *Kennedy v. Panama Co.*, L. R. 2 Q. B. 587.

In sale of specific goods parties may contract that particular stipulation shall be a condition.

But, although the general rule is as above stated, it is open to the parties, if so minded, to contract, on the sale of specific goods, that a particular stipulation, *e.g.*, a stipulation relating to the nature or condition of the goods, *shall be conditional to the validity of the sale*; and, if this is the

contract really intended, the buyer may repudiate the contract and return the goods, even after their delivery, on its appearing that the stipulation has not been complied with. In this class of cases the sale is not absolute, with a warranty or condition superadded, but conditional, and to be null if the condition is not fulfilled. *Bannerman v. White*, 10 C. B. N. S. 844, was a case of this class. There, on a sale of hops by sample, a preliminary affirmation was made by the seller that no sulphur had been used in their treatment. This undertaking, without which the buyers would not, as the seller knew, have gone on with the treaty which resulted in the sale, was honestly given, but in fact incorrect. The court held on the facts that the contract was not a mere sale with a warranty superadded, and that the buyers might repudiate the contract even after delivery of the hops. See also the judgment of the Exch. Cham. in *Behn v. Burness*, 3 B. & S. 755, 756; and, as to what stipulations are to be deemed conditions on the sale of specific goods, *Gattorno v. Adams*, 12 C. B. N. S. 560. And see the notes to *Chandelor v. Lopus*, *post*, pp. 59 *et seq.*

Although *Street v. Blay*, and *Poulton v. Lattimore* clearly established that a breach of warranty might be given in evidence in reduction, in an action of *indebitatus assumpsit* for the price, or a cross action might be brought upon the warranty, yet it was the opinion of a writer of great learning (Mr. Starkie) that “where there is a specific bargain as to price, but no warranty, and goods inferior in value to those contracted for have been delivered, the vendee must, *where it is practicable to do so without prejudice*, return the goods, and thus rescind the contract *in toto*; and if he does not, must be taken to have acquiesced in the performance of the contract.” 2 Stark. Ev. 879, 2nd ed. The learning upon this branch of law was, however, rendered obsolete by the provisions of the Judicature Act, 1873, *infra*, and the discussion of Mr. Starkie’s opinion, which followed in some former editions, has been therefore omitted.

It has been said in some cases, that the defendant, if he mean to contend that the benefit received was not that which he stipulated for, must give the plaintiff notice of his intention. However, the observation made on this subject by Lord Ellenborough, in *Basten v. Butter*, seems conclusive, viz., that, if the plaintiff sue upon a *quantum meruit*, the very form of his own declaration gives him notice that the adequacy of the consideration may be disputed.

Opinions of
Mr. Starkie
discussed.

Notice of
defence that
benefit
received was
not that
bargained for.

Quantum of reduction.

Parke, J.

With respect to *quantum of reduction*, it was said by Parke, J., in *Thornton v. Place*, 1 M. & Rob. 219, that “where a party engages to do certain specified work on certain specified terms, and in a certain specified manner, but in fact does not perform the work so as to correspond with the specification, he is not, of course, entitled to recover the price agreed on in the specification. Nor can he recover according to the actual value of the work, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed on in the specification, subject to a deduction; and the measure of that deduction is the sum it would take to alter the work so as to make it correspond with the specification.” As there, perhaps, might be cases to which this rule could not be with perfect justice applied, it probably was only laid down by the learned judge with reference to such as that immediately before him.

Bayley, B.

In *Chappel v. Hicks*, 2 C. & M. 214, Bayley, B., said, “the rule is, that if the contract be not faithfully performed, the plaintiff shall be entitled only to recover the value of the work and materials supplied.” Lord Ellenborough’s rule, laid down after consulting the judges in *Farnsworth v. Garrard*, was, “the claim shall be co-extensive with the benefit;” see *ante*, p. 25.

Lord Ellenborough.

American rule.

In the American courts, the rule on this subject seems to be the same as that recognised in the courts here before the Judicature Acts, namely, that, where a plaintiff declares upon a general count for work done, goods sold, or the like, under a special contract, the defendant may give in evidence everything that affects directly the value of the subject of the claim, as between the parties, including a breach of warranty, in reduction of damages. He was not, however, by our law bound to do so, and, if in an action against him on the special contract he had paid into court the sum claimed, he was not thereby estopped from bringing his cross-action for defective performance; *Davis v. Hedges*, L. R. 6 Q. B. 687. In the state of New York the rule is extended further, under the name of *recoupment* (as it is there called), or diminution of damages, in virtue of which a defendant in any action upon a *special contract*, even under seal, can, by giving notice, set up by way of recoupment any breach of the contract by the plaintiff, so as to reduce the damages thereby; but the defence cannot be pleaded in bar of the action; see the notes to the 4th American

Everything that directly affects value of claim, including breach of warranty, evidence in reduction of damage.

Rule of state of New York, recoupment.

edition of "Smith's Leading Cases," p. 45, by Messrs. Hare & Wallace; and for cases of diminution of damages by way of *recouper* in our courts, see *Icely v. Grew*, 6 N. & M. 469, (a).

Under R. S. C., 1883, O. XIX., r. 3, a defendant may now set off, or set up by way of counter-claim, against the plaintiff's claims any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim has the same effect as a statement of claim in a cross-action, so as to enable the court to pronounce final judgment in the same action, both on the original and on the cross-claim; and under O. XXI., r. 17, where a set-off or counter-claim is established as a defence against the plaintiff's claim, the court may, if the balance is in the defendant's favour, give him judgment for such balance, or may otherwise adjudge to him such relief as he may be entitled to upon the merits.

Before leaving the first exception to the general rule that while the special contract remained open an action of *indebitatus assumpsit* would not lie, it may be well to notice a class of cases forming only an apparent exception; that is to say, cases in which, the special contract being unperformed, a new contract has been implied from the conduct of the parties to pay remuneration commensurate with the benefit derived from partial performance. Thus, if a shipowner contracts to carry goods from A. to B. at a certain freight, and their owner voluntarily accepts the goods at a point short of B., in such a manner as to raise an inference that further carriage is dispensed with, a new contract will be implied to pay compensation in the nature of freight, for the portion of the voyage actually performed; *Luke v. Lyde*, 2 Burr. 883; *Mulloy v. Backer*, 5 East, 316; *Christy v. Row*, 1 Taunt. 300; *Hunter v. Prinsep*, 10 East, 378, 391; *Mitchell v. Darthez*, 2 B. N. C. 555; *Vlierboom v. Chapman*, 13 M. & W. 230, 238; *Blasco v. Fletcher*, 14 C. B. N. S. 147, 178; *The Soblomsten*, L. R. 1 A. & E. 293. So, where the master was justified by imminence of war in refusing to proceed to the original destination, he was held not bound to deliver the goods at an intermediate port without receiving compensation for the carriage; *The Teutonia*, L. R. 3 A. & E. 395, 4 P. C. 171; see *Cargo ex Argos*, L. R. 5 P. C. 134. In these cases, the freight *pro ratâ itineris* becomes due, not under the charter-party, but by a new contract inferred from the conduct of the

R. S. C.,
O. XIX.,
r. 3

O. XXI.,
r. 17.

Apparent ex-
ception to
general rule.

Where new
contract im-
plied to pay
remuneration
commensurate
with benefit
from partial
performance.

parties; hence it cannot become due, where, upon the facts, no new contract can be inferred; see *Metcalf v. Britannia Ironworks Co.*, 2 Q. B. D. 423; *Hill v. Wilson*, 4 C. P. D. 329; *Appleby v. Myers*, L. R. 2 C. P. 651, 660.

Where a part of a cargo was justifiably sold at a port short of the destination, to raise funds to repair sea damage to the ship, although the part sold fetched more than it would have done at the port of destination, and the price realised was allowed to the charterer on a general average statement, and was received by him from the shipowner, it was held that the latter was not entitled to recover *pro ratâ* freight on the part which had been sold; *Hopper v. Burness*, 1 C. P. D. 137.

Mere part performance of special contract not enough unless it has been accepted under circumstances from which law implies a promise to pay.

It must further be observed that, where a special contract has been only partly performed, the mere fact that the part performance has been beneficial is not enough to render the party benefited liable to pay for it; it must be shown that he has taken the benefit of the part performance under circumstances sufficient to raise an implied promise to pay for the work done, notwithstanding the non-performance of the special contract. Thus, if a builder contracts to build and complete a house for a sum payable on completion, and he partially builds the house, but fails to complete it, the fact that the owner of the premises has resumed possession of the premises does not entitle the builder to sue either on the special contract or for work and labour; for the special contract has not been performed, and the mere fact that the owner has taken possession of his premises does not afford an inference that he has dispensed with the special contract and made a new contract to pay for the work actually done; *Munro v. Butt*, 8 E. & B. 738. See also the observations in the notes to *Lampleigh v. Brathwait*, *ante*, vol. i., p. 142.

Second exception.

Absolute refusal or incapacity of one party to perform contract, entitling the other (1) to rescind, and (2) to sue on *quantum meruit*.

The next exception to the general rule, that no action of *indebitatus assumpsit* will lie while the special contract remains unperformed, is to be found in a class of cases which establish the proposition, that when one party has absolutely refused to perform, or has incapacitated himself from performing his side of the contract, the other party may rescind the contract, and sue for what he has already done under it, upon a *quantum meruit*. That he may rescind it upon an *absolute* refusal by the other party to perform his part, is proved by *Withers v. Reynolds*, *ante*, p. 21. There, the plaintiff having refused to pay for the

loads on delivery pursuant to his contract, the defendant was held entitled to rescind it. "If the plaintiff," said Patteson, J., "had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw" (see *Jonassohn v. Young*, 4 B. & S. 296); "but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant is therefore not liable for ceasing to perform his part of the contract."

This case was commented on in *Franklin v. Miller*, 4 A. & E. 599, and the same doctrine laid down: "the rule is," said Coleridge, J., "that in rescinding, as in making a contract, both parties must concur. In *Withers v. Reynolds*, each load of straw was to be paid for on delivery. When the plaintiff said that he would not pay for the loads on delivery, that was a *total* failure, and the defendant was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract." See *Ex p. Chalmers*, 8 Ch. 289; *Morgan v. Bain*, L. R. 10 C. P. 15; *Re Phoenix Co.*, 4 Ch. D. 108; *Ex p. Stapleton*, 10 Id. 586.

The refusal, to authorise the rescission of the contract, must be an unqualified one; *Ehrensperger v. Anderson*, 3 Exch. 148, 158; and it must be acted on as a breach by the person who has a right to insist on the performance of the contract; *Danube R. Co. v. Xenos*, 11 C. B. N. S. 152, 13 Id. 825. In *Lines v. Rees*, tried before Coleridge, J., at the Monmouthshire Summer Assizes, 1837, the action was *assumpsit*, on a contract to build a house for a specified sum, with a count for work and labour, and materials. It appeared that the house was not yet completed, but that a good deal of extra work had been done by the defendant's order; that the plaintiff had called on him to pay for all that had been done; and that he had replied "that he would not—perhaps never." On this evidence the plaintiff's counsel submitted that he was entitled to recover on a *quantum meruit* for the extra work, and also to treat the special contract as rescinded. Coleridge, J., admitted that this would have been so, had the refusal to pay been absolute and unqualified; but thought that, in this case, the refusal to pay must be construed with reference to the demand, which was made, so far as the work done under the contract was concerned, too soon. He therefore held the plaintiff entitled to recover only for the extras. This

Refusal must
be unqualified.

note of *Lines v. Rees* was kindly perused and confirmed by the defendant's counsel, Mr. Greaves.

As to an absolute refusal to perform the contract and a rescission on that ground, see also *Cort v. Ambergate R. Co.*, 17 Q. B. 127; *Reid v. Hoskins*, 4 E. & B. 979, 5 Id. 729, 6 Id. 953; *Avery v. Bowden*, 5 Id. 714, 6 Id. 953; *Bartholomew v. Markwick*, 15 C. B. N. S. 710; *Leeson v. N. British Oil Co.*, Ir. R. 8 C. L. 309.

*Avery v.
Bowden.*

In *Avery v. Bowden*, the defendant had agreed by charter-party to load a cargo on board the plaintiff's ship at Odessa, certain running days to be allowed. The declaration contained a count for not loading, which alleged that before the expiration of the running days the defendant had dispensed with the ship's remaining at Odessa. To this count the defendant pleaded that before the cause of action arose war had been declared between England and Russia, and that the contract had thus been rescinded.

The facts were that after the ship's arrival at Odessa, and before declaration of war, the charterer's agent repeatedly told the master that there was no cargo for the ship, and that he had better go away; but the master continued to require a cargo until the declaration of war was known at Odessa, which was before the expiration of the ship's laying days. After the declaration of war, the defendant told the plaintiff that he had determined not to load the ship, but to rely on the chapter of accidents, and that he had telegraphed to his agent at Odessa not to purchase a cargo.

Upon these facts the Queen's Bench held that, assuming that the charterer's agent had on his part renounced the contract before the declaration of war, this renunciation, not having been accepted by the master, did not either constitute a dispensation or give a cause of action. Lord Campbell, in delivering the judgment in the defendant's favour, said: "According to our decision in *Hochster v. De la Tour*, 2 E. & B. 678, to which we adhere, if the defendant, within the running days, and before the declaration of war, had positively informed the captain that no cargo had been provided or would be provided for him at Odessa, and that there was no use in his remaining there any longer, the captain might have treated this as a breach and renunciation of the contract, and thereupon sailing away from Odessa he might have loaded a cargo at a friendly port from another person; whereupon the plaintiff would have had a right to maintain an action on the charter-party

to recover damages equal to the loss he had sustained from the breach of contract on the part of the defendant. The language used by the defendant's agent before the declaration of war can hardly be considered as amounting to a renunciation of the contract; but if it had been much stronger, we conceive that it could not be considered as constituting a cause of action, after the captain still continued to insist upon having a cargo in fulfilment of the charter-party."

This judgment was affirmed in the Exch. Cham., where it was held there was *no evidence* of a dispensation; see also *Barrick v. Buba*, 2 C. B. N. S. 563, where, on a charter-party made between an English and Russian subject for the loading by the latter of a cargo at Odessa, it was held that an intimation made to the master at Odessa by the agent of the charterer that he had ceded the charter-party with all its rights and obligations to a third party, and that the master must apply to that person for a cargo, was not such a renunciation of the charter as entitled the shipowner to sue for a breach at that time; this intimation having been given before the time for loading had expired.

*Barrick v.
Buba.*

Where a party has incapacitated himself from performing his side of the contract, the same consequence follows as if he had absolutely refused to do so. In *Robson & Sharpe v. Drummond*, 2 B. & Ad. 303, D. hired a chariot for five years, at an annual sum, from Sharpe, a coach-maker, who agreed to keep it in repair during the term; the contract was with Sharpe alone. When three years had expired, Sharpe transferred his stock-in-trade, including the chariot, to Robson; Robson offered to continue the contract, but D. refused; he wished to complete the contract with Sharpe, but, upon Sharpe stating that that was impossible, he returned the chariot.

Incapacity
equivalent to
refusal.

Under these circumstances, the court held that the defendant had a right to rescind the contract, and decline to keep the chariot the remaining two years. "The very fact," said Parke, J., "of Sharpe's having transferred his interest in the contract to Robson was equivalent to saying, 'I will not perform my part of the contract;' and this is an answer to the present action." In *British Waggon Co. v. Lea*, 5 Q. B. D. 149, it was said that, in applying the rule that personal performance is of the essence of a contract induced by personal confidence, the court went, in *Robson v. Drummond*, to the utmost length to which it could be carried.

On the same principle was decided *Planché v. Colburn*, 8 Bing. 14, *post*, p. 41; see likewise *Amor v. Fearon*, 9 A. & E. 548; *Palmer v. Temple*, Id. 508, which was considered in *Hinton v. Sparkes*, L. R. 3 C. P. 164, and in *Howe v. Smith*, 27 Ch. D. 89; and *O'Neil v. Armstrong*, (1895) 2 Q. B. 418. In *Keys v. Harwood*, 2 C. B. 905, the plaintiff agreed to board and lodge the defendant at a weekly sum, but to take in payment for the board and lodging certain furniture which had been valued, provided that the arrangement lasted until that value was expended. After the agreement, and before the action, a creditor of the defendant obtained judgment against him, and took the furniture in execution. The court held that the case was the same in effect as if the defendant had himself taken away the goods, and that the plaintiff was entitled to recover for the board and lodging upon the common count as if the special contract had never existed; see also *Sands v. Clarke*, 8 C. B. 751, 762, *ad fin.*

Accidental
destruction of
premises.

Where there is a contract to do specific work upon certain premises for a sum payable on completion of the work, and, before completion, the premises are destroyed without fault on either side, further performance of the contract is excused, but no action lies for the work actually done; *Appleby v. Myers*, L. R. 2 C. P. 651; see *Turner v. Goldsmith*, (1891) 1 Q. B. 544.

Where it is an implied term of an agreement, or of a condition precedent, that a particular subject matter shall continue to exist, performance of the agreement, or condition precedent, is excused by the accidental destruction of the subject matter; *Taylor v. Caldwell*, 3 B. & S. 826; *Appleby v. Myers*, *supra*; *Chapman v. Withers*, 20 Q. B. D. 824.

Fraudulent
collusion of
defendant and
surveyor to
withhold cer-
tificate.

Where a certificate by the defendant's surveyor of the execution of work was made by the contract a condition precedent to payment of the price, it was held that the fraudulent collusion of the defendant with the surveyor to withhold such certificate did not entitle the plaintiff to treat the contract as at an end and sue upon an *indebitatus* count for the price; *Milner v. Field*, 5 Exch. 829; and it was said the only remedy was an action; see *Batterbury v. Vyse*, 2 H. & C. 42; *Pawley v. Turnbull*, 3 Giff. 70.

Rule as to
death of one of
the parties.

On a question of this sort depends the continuance of a contract after the death of one of the parties; if it was one involving personal confidence, the death of the party confided in, rendering its performance impossible, puts an end to it; otherwise not; see *Wentworth v. Cock*, 10 A. & E. 42;

Quick v. Ludborrow, 3 Bulstr. 29; *Marshall v. Broadhurst*, 1 C. & J. 403; *Siboni v. Kirkman*, 1 M. & W. 418, 423; *Bradbury v. Morgan*, 1 H. & C. 249; *Lloyd's v. Harper*, 16 Ch. D. 290. The death of *either* party determines a contract for personal services, unless it be otherwise agreed; *Farrow v. Wilson*, L. R. 4 C. P. 744; but it does not take away the right to wages already accrued due or otherwise *rescind* the contract *ab initio*; *Stubbs v. Holywell R. Co.*, L. R. 2 Ex. 311; see *Whincup v. Hughes*, L. R. 6 C. P. 78.

It must be observed that a breach of contract, to entitle the other party to rescind, must consist in the non-performance of something essential. "If the plaintiff," said Patteson, J., in *Withers v. Reynolds*, "had merely failed to pay for any particular load, that in itself might not have been an excuse to the defendant for delivering no more straw." Accord. *Fillieul v. Armstrong*, 7 A. & E. 557; *Franklin v. Miller*, 4 Id. 599; *Freeman v. Taylor*, 8 Bing. 124; *Ehrensperger v. Anderson*, 3 Exch. 158; *Corcoran v. Proser*, Ex. Ch. Ir., 22 W. R. 222; *Freeth v. Burr*, L. R. 9 C. P. 208. Nor must it be a breach occasioned by his own wrongful refusal to accept performance; see *Fitt v. Cassanet*, 4 M. & Gr. 898.

Breach to justify rescission must be of something essential,

and not occasioned by plaintiff's own wrong.

In *Hoare v. Rennie*, 5 H. & N. 19, the contract was for delivery of 667 tons of iron to be shipped from Sweden in June, July, August, and September, in about equal proportions each month, at a certain price, delivered in London. In an action by the vendors for refusal to accept or pay for the iron, a plea justifying refusal on the ground that the plaintiffs shipped in June a much smaller quantity than that required under the contract, and were never ready and willing to deliver such smaller quantity until after the defendants had notice that the plaintiffs were unable to fulfil their agreement as to the June shipment, was upheld by the Court of Exch. This case, though questioned in *Jonassohn v. Young*, 4 B. & S. 296, was cited with approval in *Bradford v. Williams*, L. R. 7 Ex. 259:

Hoare v. Rennie.

In *Simpson v. Crippin*, L. R. 8 Q. B. 14, however, a precisely similar point was raised in the Queen's Bench, and an opposite decision was arrived at. There the defendants agreed to deliver from 6,000 to 8,000 tons of coal into the plaintiffs' wagons at the defendants' collieries, in equal monthly quantities during twelve months from the 1st July. During July the plaintiffs took only 158 tons, and on the 1st August the defendants gave notice that in consequence

Simpson v. Crippin.

What breach
of contract
will justify
rescission.

of the plaintiffs having taken so small a quantity they cancelled the contract. In an action for refusing to deliver the residue, it was held that the plaintiffs' breach in taking a smaller quantity did not justify the defendants in rescinding, and Blackburn, J., said, "If the principle upon which *Hoare v. Rennie* was decided is that wherever a plaintiff has broken his contract first he cannot sue for any subsequent breach committed by the defendant, the decision would be opposed to the authority of many other cases." In *Roper v. Johnson*, L. R. 8 C. P. 167, in which a similar point arose, the decision in *Simpson v. Crippin* was treated as conclusive.

The case of *Hoare v. Rennie* was subsequently much discussed in *Honck v. Muller*, 7 Q. B. D. 92, and *Mersey Steel Co. v. Naylor*, 9 Id. 648, 9 App. Cas. 434.

*Honck v.
Muller.*

In *Honck v. Muller* the defendant sold to the plaintiff 2,000 tons of iron, to be delivered in November, "or equally over November, December, and January, at 6*d.* per ton extra." The plaintiff failed to take any iron in November, but claimed delivery of one-third in December, and one-third in January. The defendant refused this, and gave notice that he cancelled the contract. Bramwell and Baggallay, L.JJ., held that on the true construction of the contract the plaintiff was bound to elect and give notice of his option to the defendant in time to allow him to deliver the whole or part in November, and that, as he had not done so, he could not maintain the action. Assuming, however, as the plaintiff contended, that the defendant had become bound to deliver the iron in three equal instalments, they were of opinion that the plaintiff, having broken the contract by not taking the November instalment, could not insist upon the defendant delivering the residue; since to hold that he could would be to enable him to substitute, against the defendant's will, a contract to take 1,333½ tons for one to take 2,000. They treated *Hoare v. Rennie* as well decided; and Bramwell, L.J., distinguished *Simpson v. Crippin*, on the ground that the breach there was not with respect to the first instalment, and that the contract, having been part performed, could not be wholly undone. Brett, L.J., dissented from this judgment, and was of opinion that it was immaterial whether the breach was in respect of the first or of the later delivery, and that *Simpson v. Crippin* was inconsistent with *Hoare v. Rennie*, which he thought was wrongly decided, and he held that in the case before them the plaintiff was entitled to succeed.

In *Mersey Steel Co. v. Naylor*, the defendants agreed to buy from the plaintiffs 5,000 tons of steel blooms, to be delivered by instalments of 1,000 tons monthly, payment to be made within three days after receipt of documents. After the delivery of part of the first instalment a petition was presented to wind up the plaintiff company, and the defendants refused to make the payments due for the steel delivered, acting upon the erroneous advice of their solicitor that, pending the petition, no one could give them a valid discharge. An order to wind up having been made, the liquidator refused to make further deliveries, on the ground that the defendants' refusal to pay for the steel delivered entitled him to renounce the contract, and he brought the action to recover the price of the steel delivered. The defendants counterclaimed damages for the non-delivery. Lord Coleridge held that the defendants' conduct had absolved the plaintiffs from further performance of the contract, and precluded the defendants from insisting upon it. His decision was, however, reversed by the C. A.; and the reversal was affirmed in the H. L., where Lord Bramwell repudiated the dictum attributed to him in *Honck v. Muller*, "that in no case where the contract had been part performed could one party rely on the refusal of the other to go on," pointing out that every case must depend upon its special circumstances. Both in the C. A. and in the H. L. the rule of law laid down by Lord Coleridge in *Freeth v. Burr*, as governing cases of this class, was approved of, viz.: "that the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." Applying this principle to the case before them, their lordships decided that the conduct of the defendants in withholding payment for a particular delivery, under erroneous legal advice, did not evince such an intention. Lord Bramwell, in pointing out that in *Honck v. Muller* the plaintiff's conduct clearly did evince such an intention, reiterated his approval of *Hoare v. Rennie*, which he treated as decided upon the same principle.

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*Mersey Steel
Co. v. Naylor.*

The true explanation of the diversity of opinion as to *Hoare v. Rennie* is probably that given by Bowen, L.J., in *Mersey Steel Co. v. Naylor*, 9 Q. B. D. 671, namely, "that the plea was a special plea, which set out various facts from which two different inferences might quite well be drawn, and as one or the other is drawn, the decision would appear correct, or the reverse." The importance attached by Bramwell, L.J.,

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in *Honck v. Muller*, to a breach with reference to the first, as distinguished from a later instalment, may, it is submitted, be explained by similar considerations, when it is remembered that the question in all these cases is one of fact. The distinction between a first and second instalment, though immaterial in point of law, may be material in point of fact, since a failure to perform the first act under the contract may often be more cogent evidence of an intention not to be bound by it, than a subsequent failure, when an intention of holding to the bargain has been already evinced by part performance.

56 & 57 Vict.
c. 71.

In cases of this kind, the Sale of Goods Act, 1893, s. 31 (2), declares that it is "a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated."

Insolvency.

The mere insolvency or bankruptcy of either party does not of itself operate as a rescission of the contract; but if one party gives notice to the other that he is insolvent and does nothing more, the latter has the right to assume that he intends to abandon the contract; *Ex p. Chalmers*, 8 Ch. 289; *Morgan v. Bain*, L. R. 10 C. P. 15; *Re Phoenix Bessemer Co.*, 4 Ch. D. 108; *Ex p. Stapleton*, 10 Id. 586; see as to a subsequent disclaimer by the trustee, *Re Sneezum*, 3 Id. 463.

Second part of
proposition :
right after res-
cission to sue
on *quantum*
meruit.

It being therefore established that, where one contractor has absolutely refused to perform, or rendered himself incapable of performing, his part of the contract, the other contractor may, if he please, rescind, such refusal or act being equivalent to a consent to the rescission, the remaining part of the proposition above stated is, that upon such rescission he has a right, if he has done anything under the contract, to sue *immediately* for compensation on a *quantum meruit*. That he should do so is consistent with reason and justice, for it is clear that the defendant cannot be allowed to take advantage of his own wrong, and screen himself from payment for what has been done by his own tortious refusal to perform his part of the contract, which refusal alone has enabled the plaintiff to rescind it.

He cannot, however, recover on the special contract, and must, therefore, be entitled to sue upon a *quantum meruit*, founded on a promise, implied by law, on the part of the

defendant, to remunerate him for what he has done at his request; and, as an action on a *quantum meruit* is founded on a promise to pay on request, and there is no ground for implying any other sort of promise, he may, of course, bring his action *immediately*. This point was decided by *Planché v. Colburn*, 8 Bing. 14. The declaration there stated that the defendants engaged the plaintiff for 100*l.* to write a treatise on Ancient Armour, to be published in "The Juvenile Library;" that the plaintiff had written part, and was willing to complete and deliver the whole for insertion in that publication; but that the defendants would not publish it there, nor pay the 100*l.* There was also the common count for work and labour. At the trial it appeared that the plaintiff had been engaged on the above terms, that he had completed part of his work, that he had made a journey to inspect a collection of ancient armour, and made drawings therefrom; but that he had never tendered or delivered his treatise to the defendants, who had definitely abandoned the publication of "The Juvenile Library." The jury having found a verdict for the plaintiff with 50*l.* damages, the court was moved for a new trial, on the ground that the plaintiff could not recover on the special contract, since he had not tendered or delivered his work, and that he could not recover on the *indebitatus* count for work and labour, because the special contract was still open. The court, however, refused the new trial, holding that, as the defendants had, by putting an end to "The Juvenile Library," incapacitated themselves from performing their engagement with the plaintiff to publish his work there, they must be taken to have abandoned the contract altogether; and that he might recover for what he had done, upon a *quantum meruit*. "The fact was," said Tindal, C.J., "that the defendants not only suspended, but actually put an end to, 'The Juvenile Library.' They had broken their contract with the plaintiff; and an attempt was made, but quite unsuccessfully, to show that the plaintiff had afterwards entered into a new contract to allow them to publish his book as a separate work. I agree that when a special contract is in existence and open the plaintiff cannot sue on a *quantum meruit*: part of the question, therefore, here was, whether the contract did exist or not. It distinctly appeared that the work was finally abandoned, and the jury found that no new contract had been entered into. Under these circumstances, the plaintiff ought not to lose the fruit of his

Right after res-
cission to sue
on *quantum*
meruit.

May sue
immediately,
Planché v.
Colburn.

labour, and there is no ground for the application that has been made."

Broker prevented from earning sum stipulated allowed to recover reasonable compensation.

Upon the same principle, where a person had been retained as a broker by the directors of a company upon the terms that he was to receive a certain sum at once, and a further sum when all the shares should have been allotted, and the directors afterwards, without any default on the broker's part, wound up the company before all the shares had been allotted, thus *rendering impossible the allotment of all the shares*, it was held that the broker was entitled to recover, not the stipulated sum, but a reasonable compensation for his services; *Inchbald v. W. Neilgherry Co.*, 17 C. B. N. S. 733.

Application of doctrine to executory contracts where nothing has been done.

It seems that the same act by one of the parties to a contract, which gives the other party if he has partly performed it a right to rescind it, and sue in *indebitatus assumpsit* for what he may have done under it, will, in case of an executory contract where nothing has been done under it, amount to a breach of the contract so as to furnish a ground of action. See *Short v. Stone*, 8 Q. B. 358; *Lovelock v. Franklyn*, Id. 371; *Bowdell v. Parsons*, 10 East, 359; *Ford v. Tiley*, 6 B. & C. 325; *Cort v. Ambergate R. Co.*, 17 Q. B. 127; and in *Hochster v. De la Tour*, 2 E. & B. 678, the Q. B. held that such right of action might be enforced even before the day appointed by the contract for its performance by either party.

Hochster v. De la Tour.
Right of action before arrival of time for performance.

Anticipatory breach.

In that case the declaration stated that in consideration of the plaintiff agreeing with the defendant to enter his service as a courier on the 1st June, 1852, for three months from that date, at the rate of 10*l.* per month, the defendant agreed to receive him into his employ on that date upon those terms. The declaration then averred that, from the time of the agreement *until the time when the defendant wrongfully refused to perform his promise and exonerated the plaintiff from performance*, the plaintiff was always ready to perform the agreement. Breach—that the defendant *before the 1st June, 1852*, refused to engage the plaintiff or perform his promise, and wrongfully exonerated the plaintiff from the performance of the agreement. *The writ was dated the 22nd May, 1852*. It was contended, in arrest of judgment, that although a refusal by the defendant to perform the contract, if continued up to the time fixed for its performance, would give the plaintiff a right of action, yet the refusal was revocable up to such time, and the

plaintiff could not sue until its expiration. The court, however, decided that the plaintiff was not bound to wait until after the 1st June to bring his action, and that the declaration was good.

Anticipatory
breach.

Hochster v. De la Tour was approved of and followed in *Danube, &c., R. Co. v. Xenos*, 11 C. B. N. S. 152, 13 Id. 825, where it was laid down, as settled law, that where a contract is for the performance of a thing on a given day, and the person who is to perform it declares before the day that he will not perform it, then the other party has the option of at once treating this declaration as a breach of the contract.

*Danube, &c.,
Co. v. Xenos.*

In *Frost v. Knight*, L. R. 7 Ex. 111, the defendant, having promised the plaintiff to marry her upon his father's death, afterwards, while his father was still alive, announced his intention not to fulfil his promise, and for this breach the Exch. Cham., overruling the Court of Exch., held that an action lay during the father's lifetime; see *Wilkinson v. Verity*, L. R. 6 C. P. 206. The opinion of Parke, B., to the contrary of this, expressed in *Philpotts v. Evans*, 5 M. & W. 475, must now be treated as overruled.

*Frost v.
Knight.*

In *Synge v. Synge*, (1894) 1 Q. B. 466, the defendant promised the plaintiff before, and as an inducement to, her marriage with him, that he would leave to her a house and land for life. After the marriage he conveyed the property to a third person, and it was held that the plaintiff had an immediate right of action to recover damages for breach of the contract.

*Synge v.
Synge.*

In *Johnstone v. Milling*, 16 Q. B. D. 460, an attempt was made to apply the doctrine of *Hochster v. De la Tour*, and *Frost v. Knight*, to the case of a lease with several covenants. There the defendant became tenant to the plaintiff for a term of 21 years, determinable by notice at the end of the first four years, and the plaintiff covenanted to rebuild the premises at the end of the first four years on receipt of notice from the lessee so to do. Before the end of the four years the plaintiff had frequently told the defendant that he would be unable to procure the money for rebuilding, and consequently the defendant gave notice to determine the tenancy at the end of the four years. He did not give the notice to rebuild, but for some time after the end of the four years he continued in possession on the chance of the plaintiff's finding the money to rebuild. In an action brought by the plaintiff against the defendant for an independent claim, the

*Johnstone v.
Milling.*

Anticipatory
breach.

Johnstone v.
Milling.

above facts were proved in support of a counterclaim for damages founded on the repudiation by the plaintiff of his liability under the covenant before the time for performing it had arrived. The C. A., reversing the decision of the Q. B. D., held that the facts did not establish a repudiation by the lessor of his obligation under the covenant, but, assuming that they did, they held that the effect of an anticipatory breach amounting to a repudiation is to give the other party a right to rescind the contract, keeping it alive only for the purposes of bringing an action upon it, or to hold to the contract and await the time for performance; but that such repudiation beforehand is not a breach at all, unless the other party elect to treat it as a breach, and he cannot continue to reap the benefit of the contract and at the same time claim to treat it as rescinded. They held in the case before them that the lessee had not so elected, but had continued to cling to the contract, giving the requisite notice under it to determine the tenancy. The court seemed to be of opinion also, though they did not actually decide the point, that a declaration beforehand of inability to perform one covenant in a lease which, if broken when the time for performance arrived, would not have enabled the lessee to throw up the lease, could not justify the lessee in rescinding the contract within the principle of the cases above referred to.

Distinction
between cases
like *Planché v.*
Colburn, and
actions by
servants
turned away
before expira-
tion of time
of service.

There is a class of cases which appear at first sight exactly similar to *Planché v. Colburn*, and *Robson v. Drummond*, ante, pp. 35, 41, but which will be found, on closer inspection, to be distinguished by a peculiarity which it may be useful here to remark. These are the cases in which a servant, who has engaged to serve for a certain period at certain wages, is turned away by his master before the period has expired. In such a case it is clear that, if his dismissal be in consequence of his own misconduct, he will be entitled to no wages, for his faithful service is a condition precedent to his right to them, and that condition he has not performed; *Spain v. Arnott*, 2 Stark. 256; *Turner v. Robinson*, 5 B. & Ad. 789; *Amor v. Fearon*, 9 A. & E. 548; *Turner v. Mason*, 14 M. & W. 112; *Lilley v. Elwin*, 11 Q. B. 742; *Saunders v. Whittle*, 33 L. T. 816; *Boston Co. v. Ansell*, 39 Ch. D. 339, 364; unless, indeed, the terms of the agreement show that the intention of the parties was that the right to wages should be divisible; *Button v. Thompson*, L. R. 4 C. P. 330. In that case a seaman,

engaged for a voyage from Shields to Alexandria and home, "voyage not expected to exceed twelve months, amount of wages per calendar month, 5*l.* 10*s.*," was through his own negligence left on shore at Sulina, and his ship came home without him. In an action for wages for the months during which he had actually served on board, it was held, Brett, J., dissenting, that he was entitled to recover, though possibly not until the whole period of service stipulated for had expired.

If, however, the dismissal be unjust, the master cannot by his wrongful discharge prevent the servant from recovering due compensation. Such a case seems to fall within the rule we have been just discussing. The master has absolutely refused to perform his contract with the servant, and it is apprehended that the servant has thereupon a right to rescind it, and to sue upon a *quantum meruit* for what he has already done under it; see *Lilley v. Elwin*, 11 Q. B. 742, 755. On the meaning of "rescission" in this context, see *per Bowen, L.J., Boston Co. v. Ansell*, 39 Ch. D. 339, 365.

Where dismissal unjust, action lies;

But though he may rescind the contract, he is not, it has been said, obliged to do so. He has a right, it has been said, to consider it still in existence, to treat the wrongful dismissal as no dismissal at all, and to demand, at the expiration of the time for which he was hired, the whole of his stipulated wages,—not on a *quantum meruit*, but by virtue of the special contract, his own part of which he may then safely aver that he has performed, his readiness to serve during the rest of the term being considered equivalent in law to actual service; and it has been thought that he may sue in *indebitatus assumpsit*, that being no more than any creditor may do upon an *executed* special contract, and his action, though not special in its form, being still upon the special contract and supported by the same evidence by which a special count would be substantiated. *Gandell v. Pontigny*, 4 Camp. 375, is a direct authority in favour of these positions.

but no obligation to rescind contract.

That was an action brought by a clerk for his whole quarter's salary against his master, who had wrongfully dismissed him in the middle of a quarter; the declaration contained only the common count for work and labour. "If the plaintiff," said Lord Ellenborough, "was discharged without a sufficient cause, I think this action maintainable. Having served a part of the quarter, and being willing to serve the residue, in contemplation of law he may be considered to have served the whole. The defendant was

Gandell v. Pontigny.

therefore indebted to him for work and labour in the sum sought to be recovered."

This peculiar view of the rights of servants and agents wrongfully dismissed resulted from a doctrine of constructive service, originating in decisions on the law of settlement; and though it might be applicable to some other cases (see *Collins v. Price*, 5 Bing. 132) it seems difficult to understand how it could be rationally applied to most other cases of special contract. For instance, in *Planché v. Colburn* it would have been impossible, with much show of reason, to contend that Mr. Planché had *constructively* written the whole treatise on armour, when, in fact, he had only finished half of it. It has, however, been applied to cases of servants, clerks, and agents; and perhaps, therefore, the result of the authorities on this subject may be, that the remedies of a clerk, servant, or agent, when wrongfully dismissed, are as follows:

Courses open
to servant
dismissed.

1. He may bring a special action for his master's breach of contract in dismissing him, and this remedy he may pursue immediately; *Pagani v. Gandolfi*, 2 C. & P. 370; *Brace v. Calder*, (1895) 2 Q.B. 253.

2. It was once thought that he might wait till the termination of the period for which he was hired, and might then sue for his whole wages as a debt due to him in respect of complete performance of the contract on his part, relying on the doctrine of constructive service; *Gandell v. Pontigny*; see *Collins v. Price*, 5 Bing. 132; *Smith v. Kingsford*, 3 Scott, 279; but the opinions expressed in *Smith v. Hayward*, 7 A. & E. 544, *Fewings v. Tisdal*, 1 Exch. 295, and *Emmens v. Elderton*, 4 H. L. C. 624, make it now clear that this remedy is not open to him, for he cannot allege that the defendant is indebted for *work done*. It did not follow, from *Fewings v. Tisdal*, that a special action of debt averring a contract to pay, a continuing readiness on the servant's part during all the period to serve, and a dispensation from the service by the master, might not be maintained; see *per Crompton, J.*, *Emmens v. Elderton*, *supra*. But it seems to be clear now that this remedy is not open to him; see *Brace v. Calder*, *supra*.

3. He may treat the contract as rescinded, and may *immediately sue*, on a *quantum meruit*, for the work he actually performed; *Planché v. Colburn*; but in that case, as he sues on an implied contract, arising out of actual services, he can only recover for the time that he *actually* served.

This last was the point *really* decided by Lord Tenterden in *Archard v. Hornor*, 3 C. & P. 349, a case sometimes (though, it is submitted, inconsiderately) cited for the purpose of showing that a servant wrongfully dismissed cannot, *after* the expiration of the term for which he was hired, sue in *indebitatus assumpsit* for compensation for any longer period than he has actually served. In that case the plaintiffs declared on a special count, stating a hiring for a year, adding a count for wages. It turned out that the hiring was for a year, determinable by a month's notice. Lord Tenterden held that they could not recover on the first count, on the ground of variance, nor on the second for more than the period of actual service; and, as a sufficient sum had been tendered to cover that, he directed a nonsuit. It would appear that in this case the action was commenced before the expiration of the term, and, if so, Lord Tenterden's ruling was reconcilable with the case of *Gandell v. Pontigny*; and this it probably was which, on its being contended in *Ridgway v. Hungerford Market Co.*, 3 A. & E. 171, that a dismissed clerk, who had waited till the expiration of the term before suing, could not maintain *indebitatus assumpsit* for his whole wages, elicited from Coleridge, J., the remark that, "if it were necessary, he should have wished for time to consider how far this question is determined by the doctrine laid down by Lord Tenterden in *Archard v. Hornor*."

Action by servant dismissed during term of service.

That the decision of Lord Tenterden, in *Archard v. Hornor*, proceeded on the grounds above stated, has been since asserted by the court, in *Smith v. Hayward*, 7 A. & E. 544. In that case the plaintiff was hired from June 1st for a year, determinable by three months' notice. He was turned off without notice on Sept. 19th, and commenced an action on Sept. 22nd, having previously offered to serve the entire quarter. The declaration contained a special count on which the plaintiff failed, by reason of a variance, and an *indebitatus* count, upon which 4*l.*, being a sufficient sum to cover the period of *actual service*, *i.e.*, to Sept. 19th, was paid into court. He was held to be entitled to no more, upon the ground that (whatever might have been the result if he had waited till the end of the year or of the current quarter) he could not recover on the *indebitatus* count in respect of work for a period which had not elapsed when he commenced his action. The Judges cast strong reflections upon *Gandell v. Pontigny*, without, however, overruling it.

It would not be right to quit this subject without noticing

Eardly v. Price.

Action by servant dismissed during term of service.

Eardly v. Price, 2 B. & P. N. R. 333, where a different construction from any that has been yet suggested was put upon a contract similar to that in *Archard v. Hornor*. The declaration contained a count for schooling, lodging, board, &c. The last count stated that in consideration that the plaintiff had, at the defendant's request, received J. as his scholar, and that J. had left the plaintiff's school without due notice, the defendant promised to pay the plaintiff as much money as he therefore reasonably deserved to have. It appeared that the defendant had sent J. to the plaintiff's school, and taken him away without notice, the terms of the school being that "a quarter's notice is required to be given before the removal of any young gentleman, or to pay for a quarter." The plaintiff having recovered for a quarter, it was contended, on motion for a new trial, that the special count was not proved, and that the plaintiff could not recover on the *indebitatus* count, because the consideration was not actually executed. The court, however, held it was so. "The terms of the school," said Mansfield, C.J., "are, that 30*l.* a year shall be paid; but that if the scholar be taken away without notice, an additional quarter shall be paid. Still, however, the thing to be paid for is that which has been supplied. The price for half a year is 15*l.*; but if, at the end of half a year, the scholar is taken away without a quarter's notice, the price for the first half year is 15*l.* and 7*l.* 10*s.*"

Fewings v. Tisdal.

Eardly v. Price was overruled, however, by *Fewings v. Tisdal*, 1 Exch. 295. That was an action of *indebitatus assumpsit*, brought to recover a month's wages claimed by a yearly servant who had been discharged without notice, and had received wages to the time of her dismissal only. The under-sheriff, before whom the cause was tried, nonsuited the plaintiff upon the ground that the declaration should have been special, and the Court of Exch. held he was right. "It seems to me," said Parke, B., "that the true nature of the contract between a master and his servant amounts to this—that it is an agreement for a year's service, with the addition that the master may turn the servant away at any time, on giving him a month's warning, or, in lieu of that, a month's wages. It is refining to say that the month's wages given under such circumstances are an additional compensation for the bygone service; and I cannot help thinking that, in *Eardly v. Price*, the Court of Common Pleas, in order to obtain justice for the party in that particular case, broke in on

the rules of law. *Archard v. Hornor* is, in my opinion, very good sense, and lays down a good rule;" 11 Jur. 978.

Action by servant dismissed during term of service.

The right to rescind the contract at any time by giving a month's notice, or in lieu thereof a month's wages, only exists in the case of contracts with *menial servants*; *Broxham v. Wagstaffe*, Exch. H. T. 1842, 5 Jur. 845; *Todd v. Kerrich*, 8 Exch. 151; and it seems that in such cases the servant cannot claim *board wages*; *Gordon v. Potter*, 1 F. & F. 644.

Menial servants.

Since *Fewings v. Tisdal*, and *Smith v. Hayward*, before referred to, it can hardly be doubted that *Gandell v. Pontigny* would not be supported at the present day; and the opinion that a servant, if wrongfully dismissed, cannot wait till the termination of the period for which he was hired, and then sue on the common counts for his whole wages, treating the service as constructively performed, is strengthened by the observations of Patteson and Erle, JJ., in *Goodman v. Pocock*, 15 Q. B. 576, a case which appears to shake still further the ruling in *Gandell v. Pontigny*.

In *Goodman v. Pocock*, a commercial traveller, hired for a year at wages payable quarterly, and wrongfully dismissed in the middle of a quarter, brought an action for wrongful dismissal, and the declaration contained a special count for the dismissal, and also an *indebitatus* count for work and labour. At the trial, Lord Denman directed the jury not to take into account the services rendered during the broken quarter, as they were recoverable under an *indebitatus* count only, and the particulars of demand did not include any such claim. The jury gave damages accordingly, excluding any remuneration for the services during the broken quarter. The plaintiff thereupon brought a second action, claiming under an *indebitatus* count the value of those services; but the court held that the second action was not maintainable, as the plaintiff had, by his former action, treated the special contract as still open, and having recovered damages on that footing, he could not afterwards sue on an *indebitatus* count, treating the same contract as rescinded. The court also held that in the first action the jury ought to have been directed to take into consideration the services actually rendered during the broken quarter, in awarding damages under the special count. See also the observations in *Elderton v. Emmens*, 6 C. B. 160, 4 H. L. C. 624; *Snelling v. Huntingfield*, 1 C. M. & R. 26, n. (b); *Walstab v. Spottiswoode*, 15 M. & W. 501.

Goodman v. Pocock.

Contracts for personal services are not absolute contracts,

Action by servant dismissed during term of service.

Illness of servant.

Cuckson v. Stones.

but are dependent on the servant's continuing in a state of health enabling him to serve; *Boast v. Firth*, L. R. 4 C. P. 1; *Robinson v. Davison*, L. R. 6 Ex. 269; and, therefore, the servant's inability through illness to serve is no breach of the contract; *Boast v. Firth*, *supra*; *Poussard v. Spiers*, 1 Q. B. D. 410, 414; and such inability does not entitle the master to rescind the contract, unless it be permanent; *Cuckson v. Stones*, 1 E. & E. 248, 257; *K. v. Raschen*, 38 L. T. 38; or unless it go to the root of the contract; *Poussard v. Spiers*, *supra*; *Bettini v. Gye*, 1 Q. B. D. 183. Where the contract is not rescinded the servant is entitled to his wages, though unable through illness to serve; *Cuckson v. Stones*, *supra*. In *Cuckson v. Stones*, the plaintiff agreed to serve the defendant as a brewer for ten years, at a weekly wage, and the court held that a temporary illness, not amounting to or treated as a dissolution of the contract, did not disentitle him from recovering his weekly wages for the period during which he was incapacitated by illness.

Assuming the position to be correct, that a servant or agent, wrongfully dismissed, may wait till the expiration of the term, and then maintain an action in the nature of *indebitatus assumpsit* for his whole wages, questions may arise as to his conduct in the intermediate time, and how far it may afford the master a defence, or ground for mitigating damages: as, for instance, if he have before the expiration of his term hired himself to another master; see *Cumming v. Columbine*, 6 Dowl. 373; and *Speck v. Phillips*, 5 M. & W. 279. A question might also arise, how far the first master would be entitled to his intermediate earnings, by virtue of the doctrine asserted in *Thompson v. Havelock*, 1 Camp. 527; *Diplock v. Blackburn*, 3 Id. 43; *Morison v. Thompson*, L. R. 9 Q. B. 480; *Lister v. Stubbs*, 45 Ch. D. 1. See *Patmore v. Colburn*, 4 Tyr. 840.

New employment.

Upon a wrongful dismissal, a servant is entitled at once to seek other employment; *Hochster v. De la Tour*, 2 E. & B. 678, 690; and if he obtain it, that may afford the master an answer to a claim, or be a ground for mitigating damages; Id.; *Cumming v. Columbine*, 6 Dowl. 373; *Speck v. Phillips*, 5 M. & W. 279; *Reid v. Explosives Co.*, 19 Q. B. D. 264; and the servant, if he could have at once obtained other employment of a precisely similar kind, which a reasonable man would have accepted, can recover only nominal damages; *Macdonell v. Marsden*, C. & E. 281; *Brace v. Calder*, (1895) 2 Q. B. 253.

Where the contract of yearly service is put an end to by consent in the middle of a quarter, there is no implied contract to pay *pro ratâ*, but a new agreement to pay for the broken part of the year's service may be inferred from circumstances, which should therefore be submitted to the jury; *Lamburn v. Cruden*, 2 M. & Gr. 253; see *Thomas v. Williams*, 1 A. & E. 685.

Action by servant dismissed during term of service.

There is a class of cases in which a special contract remains open, but the plaintiff has, at the defendant's request, done something *beyond* what the contract required him to perform. In such cases the extra work, not being under the contract at all, is the subject matter of an action in the nature of *indebitatus assumpsit*; yet the contract must be proved, in order that it may appear how much was extra; *Buxton v. Cornish*, 12 M. & W. 426.

Where work beyond contract has been done.

CHANDELOR v. LOPUS.

PASCHÆ.—1 JACOBI 1.

[REPORTED CRO. JAC. 4.]

The defendant sold to the plaintiff a stone, which he affirmed to be a Bezoar stone, but which proved not to be so. No action lies against him, unless he either knew that it was not a Bezoar stone, or warranted it to be a Bezoar stone.

ACTION upon the case: whereas the defendant, being a goldsmith, and having skill in jewels and precious stones, had a stone, which he affirmed to Lopus to be a Bezoar stone, and sold it to him for one hundred pounds; *ubi, re verâ*, it was not a Bezoar stone.

The defendant pleaded, *Not guilty*. And verdict was given, and judgment entered for the plaintiff in the King's Bench.

But error was thereof brought in the Exchequer Chamber; because the declaration contains not matter sufficient to charge the defendant, *viz.*, that he *warranted it to be* a Bezoar stone, or that *he knew that it was not* a Bezoar stone; for it may be that he himself was ignorant whether it were a Bezoar stone or not.

And all the Justices and Barons (except Anderson) held, that for this cause it was error. For the bare affirmation that it was a Bezoar stone, without warranting it to be so, is no cause of action. And, although he knew it to be no Bezoar stone, it is not material (*a*); for every one, in selling his wares, will affirm that his wares are good, or the horse which he sells is sound: yet if he does not warrant them to be so, it is no cause of action. And the warranty ought to be made at the same time as the sale (*b*). Fitz. Nat. Brev. 94 c, & 98 b; 5 H. 7, 41; 9 H. 6,

(*a*) This proposition, which was not necessary to the decision, is incorrect; see the notes, *post*; and the argument for the plaintiff in error in this very case

admits the contrary.

(*b*) For, if made afterwards, there is no consideration for it; Finch, L. 189; 3 Bl. Comm. 166.

53; 12 H. 4, 1; 42 Ass. 8; 7 H. 4, 15. Wherefore, forasmuch as no warranty is alleged, they held the declaration to be ill.

Anderson to the contrary; for the deceit in selling it as a Bezoar, whereas it was not so, is cause of action.

But, notwithstanding, it was adjudged to be no cause, and the judgment was reversed.

If the plaintiff in this case were to claim upon a warranty of the stone, he would at the present day perhaps succeed, the rule of law being that *every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended*; see *Power v. Barham*, 4 A. & E. 473; *Shepherd v. Kain*, 5 B. & Ald. 240; *Freeman v. Baker*, 2 N. & M. 446; *Hopkins v. Tanqueray*, 15 C. B. 130; *Carter v. Crick*, 4 H. & N. 412; and *Stucley v. Baily*, 1 H. & C. 405. If not, he would at all events succeed, if he were to sue in *tort*, laying a *scienter*, since the fact of the defendant's being a jeweller would be almost irresistible evidence that he knew his representation to be false.

Every affirmation at time of sale is a warranty if so intended.

When *Chandelor v. Lopus* was decided, as the action of *assumpsit* was by no means so distinguishable from *case*, ordinarily so called, as at present; so the distinction was not then clearly recognised, which is now, however, perfectly established, between an action upon a warranty, express or implied, which is founded on the defendant's promise that the thing shall be as warranted, and in order to maintain which it is unnecessary that he should be at all aware of the fallacious nature of his undertaking, and the action upon the case for false representation, in order to maintain which the defendant must be shown to have been actually and fraudulently cognisant of the falsehood of his representation, or to have made it fraudulently without belief that it was true; actions of the former description being then usually framed in *tort*, under the name of *actions for deceit*; see *Williamson v. Allison*, 2 East, 446; the observations of Grose, J., in *Pasley v. Freeman*, 3 T. R. 54, and of Tindal, C.J., in *Budd v. Fairmaner*, 8 Bing. 48; *Behn v. Kemble*, 7 C. B. N. S. 260. *Stuart v. Wilkins*, 1 Dougl. 18, is said by Lawrence, J., in 2 East, 452, to have been the *first* case where the question was regularly discussed, and the mode of declaring in *assumpsit* established. However, the main doctrine laid

Distinction between action on warranty and action for false representation.

If plaintiff
declare for
misrepresen-
tation he must
aver *scienter*.

down in *Chandelor v. Lopus* has never since been disputed, viz., that the plaintiff must either declare upon a contract, or, if he declare in *tort* for a misrepresentation, must aver a *scienter*. That such an action is maintainable when the *scienter* can be proved, though there be no warranty, is now (notwithstanding the *dictum* in the text) well established. *Dunlop v. Waugh*, Peake, 123; *Jendwine v. Slade*, 2 Esp. 572; *Dobell v. Stevens*, 3 B. & C. 623; *Fletcher v. Bowsher*, 2 Stark. 561.

If statement
not intended
as warranty,
he must prove
scienter.

It is sometimes not very easy to determine whether an action of *assumpsit* upon a warranty should be brought against the vendor of a chattel, or whether the proper remedy be by action upon the case for misrepresentation. We have already observed that every affirmation respecting the chattel, made, at the time of sale, by its vendor, is a warranty *if so intended*. But it is sometimes far from easy to decide whether a particular assertion was or was not intended for a warranty; and, if it turn out to have been meant merely for a representation, the plaintiff suing on it must aver a *scienter*, and must not treat it as a warranty, but will be defeated unless it turn out to have been false within the knowledge of the party making it. Such was the case of *Budd v. Fairmaner*, 8 Bing. 48, where the plaintiff, in order to prove the warranty, put in the following instrument, signed by the defendant: "Received of Mr. Budd, 10*l.* for a grey four-year-old colt, warranted sound in every respect." It was held that the warranty applied only to the soundness, and that the age was mere matter of description; and the plaintiff, who had sued as upon a warranty of the age, was nonsuited. See also *Allan v. Lake*, 18 Q. B. 560.

With respect to actions upon the case for a false representation, the declaration always imputed to the defendant fraud and an intent to deceive the plaintiff, and, as was laid down by Gibbs, C.J., in *Ashlin v. White*, Holt, N. P. 387, "fraud and falsehood must concur to sustain this action." Still, in order to *prove* such fraud as the law considers sufficient to sustain the action, it is only necessary to show, (1) that the defendant's assertion was false within his knowledge, or was made by him recklessly, without any belief in its truth, or without any knowledge on the subject; (2) that he made it with an intention that the plaintiff should act on the faith of it; and (3) that the plaintiff acted on the faith of it, and suffered damage by so doing. See the notes to *Pasley v.*

Freeman, post, p. 64, which is the leading case on actions of this description.

As to actions for breach of warranty of authority as agent, see the notes to *Thomson v. Davenport*, post, p. 381.

The first instance in which an action of *tort* for a misrepresentation respecting the ability of a third person was solemnly adjudged to be maintainable was this case of *Pasley v. Freeman*, which was decided in 1789 by Lord Kenyon, Ashhurst, J., and Buller, J., against the opinion of Grose, J. It came before the court on motion in arrest of judgment, on a declaration stating "that the defendant, intending to deceive and defraud the plaintiffs, did wrongfully and deceitfully encourage and persuade them to deliver certain goods to Falch on credit, and for that purpose did falsely, deceitfully, and fraudulently assert that Falch was a person safely to be trusted, whereas, in truth, Falch was not a person safely to be trusted, and the defendant well knew the same." One of the consequences of its introduction was to qualify considerably the effect of s. 4 of the Statute of Frauds, which requires that guarantees should be in writing; since it frequently happened that, where one person had interested himself to procure credit for another, in a manner which would have been insisted upon as amounting to a guarantee but for the enactment of the Statute of Frauds, the expressions used by him in his endeavours to effect his purpose were relied on as representations respecting his friend's credit or character, and he was accordingly sued in the form of which *Pasley v. Freeman* established the legitimacy. It was in order to prevent the Statute of Frauds from being thus trenched upon that the legislature, in Lord Tenterden's Act, s. 6, enacted that "no action shall be brought whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (*sic*), unless such representation or assurance be made in writing, signed by the party to be charged therewith."

Action of *tort* for misrepresentation as to ability of third person.

Pasley v. Freeman.

Lord Tenterden's Act, 9 Geo. 4, c. 14.

This section of the Act was elaborately discussed in the great case of *Lyde v. Barnard*, 1 M. & W. 101. It was an action on the case for falsely representing, in answer to inquiries on that subject, that the life-interest of Lord Edward Thynne in certain trust-funds was charged only with three annuities; whereby the plaintiff was induced to

Lyde v. Barnard.

*Lyde v.
Barnard.*

advance to Lord E. T. 999*l.* for the purchase of an annuity, secured by his covenant, bond, warrant of attorney, and an assignment of his life-interest in the said funds; whereas the defendant well knew that the said interest was charged not only with three annuities, but with a mortgage for 20,000*l.* At the trial, it appeared that the false representation was made by parol, on which Lord Abinger nonsuited the plaintiff, conceiving the case to fall within the above section. On the motion for a new trial, the court was equally divided, and the learned barons delivered elaborate opinions *seriatim*.

Lord Abinger and Gurney, B., thought the case within the section, conceiving the true construction to be, that the representation or assurance, thereby required to be in writing, should concern or relate to the *ability* of the third person effectually to perform and satisfy an engagement of a pecuniary nature, into which he has proposed to enter, and on the faith of which he was to obtain money, credit, or goods; and conceiving that the representation in this case did concern the *ability* of Lord E. T. to perform an engagement of a pecuniary nature, on the faith of which he was to obtain money, since it concerned his ability to give the plaintiff a sufficient security to repay him, by way of a life annuity, the money he was about to advance.

On the other hand, Parke and Alderson, BB., conceived that the representation in question did not appear to relate to "the character, conduct, credit, ability, trade, or dealings" of Lord E. T.; and, therefore, did not fall within the statute. "It does not," said Parke, B., "concern or relate to his *character*, nor to his *credit*; it does not relate to his *conduct*, *trade*, or *dealings*, for it is wholly immaterial, with reference to the inquiry and the answer to it, who had incumbered the fund: the only question in substance being, to what extent it was incumbered. And it does not concern or relate to his *ability*; for that word, especially when we look at those which accompany it, means, in its ordinary sense, some quality belonging to the third party, and not to the thing to be transferred." He further thought that if it was doubtful whether the representation was meant to relate to the state of the fund only, or to the state of the fund as an element of Lord E. T.'s personal credit, that question ought to have been submitted to the jury.

The court being equally divided, the rule would have been discharged; but the question being of great importance,

a new trial was granted on payment of costs, in order that it might be raised upon the record. I am not, however, aware that it was so. The point was again raised, but not decided, in *Turnley v. Macgregor*, 6 M. & Gr. 46, the plea which denied that the representation was in writing having been held to be at all events ill for argumentativeness.

The opinion of Lord Abinger and Gurney, B., appears, however, to be reinforced by that of the Q. B. in *Swann v. Phillips*, 8 A. & E. 457. There the declaration was that the defendant falsely and fraudulently represented to the plaintiff that she might safely lend J. 300*l.*, and take no further security than his promissory note, because the title deeds of an estate which the defendant said that J. had bought were in the defendant's possession, and nothing could be done without his knowledge, and the plaintiff would be perfectly safe in making the loan; whereby the plaintiff was induced to lend. The defendant pleaded that the representations were concerning the ability of J. to re-pay and were not in writing, and this plea was held good on demurrer.

In *Haslock v. Fergusson*, 7 A. & E. 86, the Q. B. held that though the action be for money had and received to recover cash obtained from the plaintiff by means of the misrepresentation, still if the misrepresentation constitute the whole of the plaintiff's case, parol evidence of it cannot be received. In *Tatton v. Wade*, 18 C. B. 371, where the plaintiff had been induced to incur a loss partly by written and partly by oral representations, a ruling that the plaintiff was entitled to the verdict, if she was substantially and mainly influenced by the written representation, was upheld by the Exch. Chamber.

The Act applies to a misrepresentation by one partner respecting the credit of the firm; *Devaux v. Steinkeller*, 6 B. N. C. 84. In *Swift v. Winterbotham*, L. R. 8 Q. B. 244, a false representation signed by the manager of a banking company in the course of his business was held to be a signature by the party to be charged within the meaning of the Act, so as to render the banking company liable as well as the manager; but on appeal the decision was overruled on this point; *Swift v. Jewsbury*, L. R. 9 Q. B. 301; see also *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259. The Act does not apply to the representation by the secretary of a company that a transfer of shares has been

Swann v. Phillips.

Parol evidence of representation not admissible.

Rule where representation partly verbal

By partner as to firm.

Representation by bank manager.

“lodged” with the company; *Bishop v. Balkis Co.*, 25 Q. B. D. 512.

Rights of
buyer of
goods, in
case of
fraudulent
misrepresen-
tation.

When a person has been induced to buy goods by a fraudulent misrepresentation by the seller, he is in general not only entitled to sue the seller for the fraud, but may also, on discovering the fraud, rescind the contract, and, if he has paid the price, recover it back as money had and received to his use, provided that he can restore the goods in the same state as that in which he received them; *Clarke v. Dixon*, E. B. & E. 148; see *Urquhart v. Macpherson*, 3 App. Cas. 831, 838; *Houldsworth v. City of Glasgow Bank*, 5 Id. 317, 323.

In contracts of sale, where an article is sold upon the condition that, if it does not answer some warranty, it may be returned within a certain time, the fact that the article has in the meantime become depreciated in value without default in the buyer does not destroy his right to return it; *Head v. Tattersall*, L. R. 7 Ex. 7; and where the article is destroyed, or so damaged that it cannot be returned, the non-return may be no bar to a claim for the breach of warranty, though there be a condition that non-return shall be a bar to any such claim; *Chapman v. Withers*, 20 Q. B. D. 824; see *ante*, p. 36.

Of persons
induced to
take shares.

A person who has been induced, by the fraudulent misrepresentations of the directors, or other agents of a company, to take shares in the company, cannot, while he remains a shareholder, sue the company for damages for the fraud; *Houldsworth v. City of Glasgow Bank*, *supra*; but he can bring an action of deceit against the directors or other agents of the company who made the fraudulent misrepresentations; *Knox v. Hayman*, 67 L. T. 137.

Right of
shareholder
to rescind.

A person who has been induced to take or buy shares in a company by any material false representation of the company, or of its agents (or of a promoter, *Karberg's Case*, [1892] 3 Ch. 1), is entitled to rescind the contract, provided that he do so within a reasonable time; but, after proceedings have been commenced to wind up the company, whether voluntarily or compulsorily, it is too late to rescind; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Venezuela R. Co. v. Kisch*, Id. 99; *Reese River Co. v. Smith*, 4 Id. 64; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317; *Burgess's Case*, 15 Ch. D. 507; *Stone v. City & County Bank*, 3 C. P. D. 282; unless, indeed, active steps have been taken to rescind before the commencement of the winding up; *Ross v. Estates Investment Co.*, 3 Ch. 682; *Re Estates*

Investment Co., 4 Id. 497 ; *Re Scottish Petroleum Co.*, 23 Ch. D. 413 ; *Karberg's Case*, (1892) 3 Ch. 1. By acquiescence, laches, or delay, the shareholder may lose his right to rescind ; *Wainwright's Case*, 62 L. T. 30 ; *Skelton's Case*, 68 Id. 210 ; see *Karberg's Case*, *supra*.

As to the effect, upon the validity of a lease, of fraudulent misrepresentations as to the purpose for which the demised premises were to be used, see *Feret v. Hill*, 15 C. B. 207 ; see also *R. v. Saddlers' Co.*, 4 B. & S. 570, 10 H. L. C. 404.

The question of fraud is further discussed in the notes to *Pasley v. Freeman*, *post*, p. 80.

Where the false representation amounts only to a warranty, and the sale is of a specific ascertained article, the buyer has no right to return it, for in such cases the property (unless the contrary appears to have been intended by the parties) passes by the sale ; *Dixon v. Yates*, 5 B. & Ad. 313, 340 ; *Gilmour v. Supple*, 11 Moo. P. C. 551. A warranty, being merely a collateral promise in consideration of the contract of sale, a breach of it affords no ground for rescinding the contract ; see *Foster v. Smith*, 18 C. B. 156 ; *Street v. Blay*, 2 B. & Ad. 456 ; *Mondel v. Steel*, 8 M. & W. 858 ; *Hinchcliffe v. Barwick*, 5 Ex. D. 177.

Breach of warranty.

The term warranty has, however, been constantly applied (notwithstanding the protest of Lord Abinger, in *Chanter v. Hopkins*, 4 M. & W. 404) to descriptions given of the subject matter of the sale, in cases where the sale is not of a specific article, but only of a certain description of article ; cases, therefore, where the property cannot pass by the bargain ; see *Atkinson v. Bell*, 8 B. & C. 277 ; *Mucklow v. Mangles*, 1 Taunt. 318. In such cases, compliance with the so-called warranty is a condition precedent to the purchaser's liability to accept or pay, and if the article tendered does not correspond with the given description, the purchaser is entitled to reject it, and (if he has paid for it) to recover the price as money received to his use ; see *Lucy v. Mouflet*, 5 H. & N. 229 ; *Wieler v. Schilizzi*, 17 C. B. 619 ; *Macdonald v. Longbottom*, 1 E. & E. 977 ; *Bannerman v. White*, 10 C. B. N. S. 844 ; *Josling v. Kingsford*, 13 Id. 447 ; *Azémar v. Casella*, L. R. 2 C. P. 431, 677. Questions of much nicety often arise in considering whether the inferior character of an article which the parties have treated as the subject of a sale renders it not an article of the kind of which it was supposed to be on the sale, or is merely a breach of a collateral warranty. If the case is of

Goods sold by description.

When compliance with description is condition precedent to purchaser's liability.

the former class, as where a gilt bar is innocently sold as a bar of gold, the purchaser may recover the price paid as money received to his use ; if the case belongs to the latter class, the only remedy open to him is an action for the breach of warranty ; see *Jones v. Ryde*, 5 Taunt. 488 ; *Gompertz v. Bartlett*, 2 E. & B. 849 ; *Couturier v. Hastie*, 8 Exch. 40, 9 Id. 102, 5 H. L. C. 673 ; *Hall v Conder*, 2 C. B. N. S. 22 ; *Heilbutt v. Hickson*, L. R. 7 C. P. 438.

Kennedy v.
Panama Mail
Co., per
Blackburn, J.

The law upon this question was thus stated by Blackburn, J., in *Kennedy v. Panama Mail Co.*, L. R. 2 Q. B. 587 : “ There is a very important difference between cases where a contract may be rescinded on account of fraud and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind ; but where there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be, and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse’s soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse, and were in error, yet the purchaser must pay the whole price unless there was a warranty, and even if there was a warranty he cannot return the horse and claim back the whole price unless there was a condition to that effect in the contract ; *Street v. Blay*, 2 B. & Ad. 456.”

Sale of Goods
Act, 1893,
56 & 57 Vict.
c. 71.

The law as to conditions and warranties upon the sale of all personal chattels (except things in action and money) is now contained in the Sale of Goods Act, 1893.

Definition of
“warranty.”

“Warranty” means “an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated ;” s. 62 (1).

“Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract;” s. 11 (1) (b).

Whether condition or warranty is question of construction.

The buyer may waive a condition, or may elect to treat the breach of a condition as a breach of warranty, and not as a ground for treating the contract as repudiated; s. 11 (1) (a). And “where a contract of sale is not severable, and the buyer has accepted the goods or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect;” s. 11 (1) (c); see *Perkins v. Bell*, (1893) 1 Q. B. 193. “Specific goods” mean “goods identified and agreed upon at the time a contract of sale is made;” s. 62 (1).

Condition may be waived, or treated as warranty.

Breach of condition *must* sometimes be treated as breach of warranty.

“Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description;” s. 13.

Sale by description;

by sample *and* description.

Upon a sale by sample, the following conditions are implied: (a) “that the bulk shall correspond with the sample in quality;” (b) “that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;” (c) “that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample;” s. 15.

Conditions implied on sale by sample.

“Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller’s skill or judgment, and the goods are of a description which it is in the course of the seller’s business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; provided that, in the case of a contract for the sale of a specified article under its patent or other trade

Implied condition that goods are fit for particular purpose;

or are
merchantable.

name, there is no implied condition as to its fitness for any particular purpose ;” s. 14 (1). And “where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ; provided that, if the buyer has examined the goods, there shall be no implied condition as to defects which such examination ought to have revealed ;” s. 14 (2). See *Jones v. Just*, L. R. 3 Q. B. 197 ; *Mody v. Gregson*, L. R. 4 Ex. 49 ; *Randall v. Newson*, 2 Q. B. D. 102 ; *Drummond v. Van Ingen*, 12 App. Cas. 284 ; *Jones v. Padgett*, 24 Q. B. D. 650. “Quality of goods” includes their state or condition ; s. 62.

Usage of
trade.

“An implied warranty or condition as to quality, or fitness for a particular purpose, may be annexed by the usage of trade ;” s. 14 (3). And “an express warranty or condition does not negative a warranty or condition implied by the Act, unless inconsistent therewith ;” s. 14 (4).

Except as provided by the Act, or by any statute, “there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale ;” s. 14.

Implied con-
dition for
good title ;

“Unless the circumstances of the contract are such as to show a different intention, there is an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass” ; and “an implied warranty that the buyer shall have and enjoy quiet possession of the goods ;” s. 12.

and warranty
of quiet
possession.

Warranty on
hire of chattel.

A person who lets out carriages on hire is bound to supply a carriage as fit for the purpose for which it is hired as care and skill can render it ; and if, whilst the carriage is being properly used for such purpose, it breaks down, the person who lets it is bound to show that the break down was not preventible by any care or skill ; *Hyman v. Nye*, 6 Q. B. D. 685 ; see *Fowler v. Lock*, L. R. 10 C. P. 90.

In the case of a *specific and agreed* chattel, however, it seems that there is no implied warranty that it shall be reasonably fit for the purpose for which it is hired ; *Robertson v. Amazon Tug Co.*, 7 Q. B. D. 598. See notes to *Coggs v. Bernard*, vol. i., pp. 228—230.

Verbal
warranty.

Evidence is admissible of verbal warranties, even where there is a written memorandum relating to the contract of

sale; *Allen v. Pink*, 4 M. & W. 140; provided that it does not purport to be a reduction into writing of the whole contract; *Harnor v. Groves*, 15 C. B. 667. An implied warranty may be excluded by an express stipulation that the goods are "to be taken with all faults;" *Taylor v. Bullen*, 5 Exch. 779; see *Ward v. Hobbs*, 4 App. Cas. 13.

As to the admissibility of parol evidence in Chancery to show that the parties to a written instrument of sale were mistaken as to the subject of it, see *Price v. Ley*, 32 L. J. Ch. 530, and *Kennedy v. Panama Co.*, L. R. 2 Q. B. 580.

PASLEY *v.* FREEMAN.

TRINITY, 29 GEO. 3.—IN THE KING'S BENCH.

[REPORTED 3 T. R. 51 (1 R. R. 634).]

A false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action, it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is.

THIS was an action in the nature of a writ of deceit; to which the defendant pleaded the general issue. And after a verdict for the plaintiffs on the third count, a motion was made in arrest of judgment.

The third count was as follows: "And whereas also the said Joseph Freeman, afterwards, to wit, on the 21st day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, further intending to deceive and defraud the said John Pasley and Edward, did wrongfully and deceitfully encourage and persuade the said John Pasley and Edward to sell and deliver to the said John Christopher Falch divers other goods, wares, and merchandises, to wit, sixteen other bags of cochineal of great value, to wit, of the value of 2634*l.* 16*s.* 1*d.*, upon trust and credit; and did for that purpose there and then falsely, deceitfully, and fraudulently, assert and affirm to the said John Pasley and Edward, that the said John Christopher then and there was a person safely to be trusted and given credit to in that respect; and did thereby falsely, fraudulently, and deceitfully, cause and procure the said John Pasley and Edward to sell and deliver the said last-mentioned goods, wares, and merchandises, upon trust and credit, to the said John Christopher; and in fact they the said John Pasley and Edward, confiding in and giving credit to the said last-mentioned assertion and affirmation of the said Joseph, and believing the same to be true, and not knowing the contrary thereof, did afterwards,

to wit, on the 28th day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, sell and deliver the said last-mentioned goods, wares, merchandises, upon trust and credit, to the said John Christopher; whereas in truth and in fact, at the time of the said Joseph's making his said last-mentioned assertion and affirmation, the said John Christopher was not then and there a person safely to be trusted and given credit to in that respect, and the said Joseph well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid. And the said John Pasley and Edward further say, that the said John Christopher hath not, nor hath any other person on his behalf, paid to the said John Pasley and Edward, or either of them, the said sum of 2634*l.* 16*s.* 1*d.* last mentioned, or any part thereof, for the said last-mentioned goods, wares, and merchandises; but on the contrary the said John Christopher then was, and still is, wholly unable to pay the said sum of money last-mentioned, or any part thereof, to the said John Pasley and Edward, to wit, at London aforesaid, in the parish and ward aforesaid; and the said John Pasley and Edward aver that the said Joseph falsely and fraudulently deceived them in this, that at the time of his making his said last-mentioned assertion and affirmation, the said John Christopher was not a person safely to be trusted or given credit to in that respect as aforesaid, and the said Joseph then well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid; by reason of which said last-mentioned false, fraudulent, and deceitful assertion and affirmation of the said Joseph, the said John Pasley and Edward have been deceived and imposed upon, and have wholly lost the said last-mentioned goods, wares, and merchandises, and the value thereof, to wit, at London aforesaid, in the parish and ward aforesaid: to the damage," &c.

Application was first made for a new trial, which, after argument, was refused: and then this motion in arrest of judgment. *Wood* argued for the plaintiffs, and *Russell* for the defendant, in the last term: but as the court went so fully into this subject in giving their opinions, it is unnecessary to give the arguments at the bar.

The court took time to consider of this matter, and now delivered their opinions *seriatim*.

GROSE, J. Upon the face of this count in the declaration, no privity of contract is stated between the parties. No consideration arises to the defendant. And he is in no situation in which the law considers him in any trust, or in which it demands from him any account of the credit of Falch. He appears not to be interested in any transaction between the plaintiffs and Falch, nor to have colluded with them [him]; but he knowingly asserted a falsehood by saying that Falch might be safely entrusted with the goods, and given credit to, for the purpose of inducing the plaintiffs to trust him with them, by which the plaintiffs lost the value of the goods. Then this is an action against the defendant for making a false affirmation, or telling a lie, respecting the credit of a third person, with intent to deceive, by which the third person was [the plaintiffs were] damnified: and, for the damages suffered, the plaintiffs contend that the defendant is answerable in an action upon the case. It is admitted that the action is new in point of precedent: but it is insisted that the law recognises principles on which it may be supported. The principle on which it is contended to lie is, that wherever deceit or falsehood is practised to the detriment of another the law will give redress. This proposition I controvert; and shall endeavour to show that in *every* case where deceit or falsehood is practised to the detriment of another, the law will not give redress; and I say that by the law, as it now stands, no action lies against any person standing in the predicament of this defendant for the false affirmation stated in the declaration. If the action can be supported, it must be upon the ground that there exists in this case what the law deems *damnum cum injuriâ*. If it does, I admit that the action lies; and I admit that, upon the verdict found, the plaintiffs appear to have been damnified. But whether there has been *injuria*, a wrong, a tort for which an action lies, is matter of law. The *tort* complained of is the false affirmation made with intent to deceive; and it is said to be an action upon the case analogous to the old writ of deceit. When this was first argued at the bar, on the motion for a new trial, I confess I thought it reasonable that the action should lie: but on looking into the old books for cases in which the old action of deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The cases on this head

are brought together in Bro. tit. *Deceit*, pl. 29, and in Fitz. Abr. I have likewise looked into Danvers, Kitchins, and Comyns, and I have not met with any case of an action upon a false affirmation, except against a *party to a contract*, and where there is a *promise*, either express or implied, that the fact is true which is misrepresented: and no other case has been cited at the bar. Then, if no such case has ever existed, it furnishes a strong objection against the action, which is brought for the first time, for a supposed injury which has been daily committed for centuries past; for I believe there has been no time when men have not been constantly damnified by the fraudulent misrepresentations of others: and if such an action would have lain, there certainly has been, and will be, a plentiful source of litigation of which the public are not hitherto aware. A variety of cases may be put:—Suppose a man recommends an estate to another, as knowing it to be of greater value than it is; when the purchaser has bought it, he discovers the defect, and sells the estate for less than he gave; why may not an action be brought for the loss, upon any principle that will support this action? And yet such an action has never been attempted. Or suppose a person present at the sale of a horse asserts that he was his horse, and that he knows him to be sound and sure-footed, when in fact the horse is neither the one nor the other; according to the principle contended for by the plaintiffs, an action lies against the person present as well as the seller; and the purchaser has two securities. And even in this very case, if the action lies, the plaintiffs will stand in a peculiarly fortunate predicament, for they will then have the responsibility both of Falch and the defendant. And they will be in a better situation than they would have been, if, in the conversation that passed between them and the defendant, instead of asserting that Falch might safely be trusted, the defendant had said, “If he do not pay for the goods, I will;” for then undoubtedly an action would not have lain against the defendant. Other and stronger cases may be put of actions that must necessarily spring out of any principle upon which this can be supported, and yet which were never thought of till the present action was brought. Upon what principle is this act said to be an injury? The plaintiffs say, on the ground that, when the question was asked, the defendant was bound to

(GROSE, J.)

tell the truth. There are cases, I admit, where a man is bound not to misrepresent, but to tell the truth; but no such case has been cited, except in the case of *contracts*; and all the cases of deceit for misinformation may, it seems to me, be turned into actions of *assumpsit*. And so far from a person being bound, in a case like the present, to tell the truth, the books supply me with a variety of cases in which even the contracting party is not liable for a misrepresentation. There are cases of two sorts, in which, though a man is deceived, he can maintain no action. The first class of cases (though not analogous to the present) is where the affirmation is that the thing sold has not a defect which is a visible one: there the imposition, the fraudulent intent, is admitted, but it is no *tort* (a). The second head of cases is where the affirmation is (what is called in some of the books) a nude assertion, such as the party deceived may exercise his own judgment upon; as where it is a matter of opinion, where he may make inquiries into the truth of the assertion, and it becomes his own fault from laches that he is deceived. 1 Roll. Abr. 101; Yelv. 20; 1 Sid. 146; Cro. Jac. 386, *Bayly v. Merrel*. In *Harvey v. Young*, Yelv. 20, J. S., who had a term for years, affirmed to J. D. that the term was worth 150*l.* to be sold, upon which J. D. gave 150*l.*, and afterwards could not get more than 100*l.* for it, and then brought his action; and it was alleged that this matter did not prove any fraud, for it was only a naked assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. *But if the defendant had warranted* the term to be of such a value to be sold, and upon that the plaintiff had bought it, it would have been otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. This case, and the passage in 1 Roll. Abr. 101, are recognised in 1 Sid. 146. How, then, are the cases? None exist in which such an action as the present has been brought; none in which any principle applicable to the present case has been laid down to prove that it will lie—not even a *dictum*. But from the cases cited some principles may be extracted to show that it cannot be sustained:

(a) See *Margetson v. Wright*, 7 Bing. 605, 8 Bing. 457; 3 Bl. Comm. 166; *Dyer v. Hargrave*, 10 Ves. 507.

1st, That what is fraud, which will support an action, is matter of law; 2ndly, That in *every* case of a fraudulent misrepresentation attended with damage an action will not lie, *even between contracting parties*; 3rdly, That if the assertion be a nude assertion, it is that sort of misrepresentation, the truth of which does not lie merely in the knowledge of the defendant, but may be inquired into, and the plaintiff is bound so to do; and he cannot recover a damage which he has suffered by his laches. Then let us consider how far the facts of the case come within the last of these principles. The misrepresentation stated in the declaration is respecting the credit of Falch; the defendant asserted that the plaintiffs might safely give him credit: but credit to which a man is entitled is matter of judgment and opinion, on which different men might form different opinions, and upon which the plaintiffs might form their own: to mislead which no fact to prove the good credit of Falch is falsely asserted. It seems to me, therefore, that any assertion relative to credit, especially where the party making it has no interest, nor is in any collusion with the person respecting whose credit the assertion is made, is like the case in *Yelverton* respecting the value of the term. But at any rate it is not an assertion of a fact peculiarly in the knowledge of the defendant. Whether Falch deserved credit depended on the opinion of many; for credit exists on the good opinion of many. Respecting this, the plaintiffs might have inquired of others, who knew as much as the defendant; it was their fault that they did not, and they have suffered damage by their own laches. It was owing to their own gross negligence that they gave credence to the assertion of the defendant, without taking pains to satisfy themselves that that assertion was founded in fact, as in the case of *Bayly v. Merrel*. I am therefore of opinion that this action is as novel in principle as it is in precedent, that it is against the principles to be collected from analogous cases, and consequently that it cannot be maintained.

BULLER, J. The foundation of this action is fraud and deceit in the defendant and damage to the plaintiffs. And the question is, Whether an action thus founded can be sustained in a court of law. *Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. Per*

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Croke, J., 3 Bulst. 95. But it is contended, that this was a bare naked lie, that, as no collusion with Falch is charged, it does not amount to a fraud: and, if there were any fraud, the nature of it is not stated. And it was supposed by the counsel who originally made the motion, that no action could be maintained, unless the defendant, who made this false assertion, had an interest in so doing. I agree that an action cannot be supported for telling a bare naked lie; but that I define to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive, another person. *Every deceit comprehends a lie; but a deceit is more than a lie,* on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person. Deceit is a very extensive head in the law; and it will be proper to take a short view of some of the cases which have existed on the subject, to see how far the courts have gone, and what are the principles upon which they have decided. I lay out of the question the case in Cro. Jac. 196, and all other cases which relate to freehold interests in lands; for they go on the special reason that the seller cannot have them without title, and the buyer is at his peril to see it. But the cases cited on the part of the defendant deserving notice are, Yelv. 20; Carth. 90; 1 Salk. 210. The first of these has been fully stated by my brother Grose: but it is to be observed that the book does not affect to give the reasons on which the court delivered their judgment; but it is a case quoted by counsel at the bar, who mentions what was alleged by counsel in the other case. If the court went on a distinction between the words *warranty* and *affirmation*, the case is not law; for it was rightly held by Holt, C. J., in the subsequent cases, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended (b). But the true ground of that determination was, that the assertion was of mere matter of judgment and opinion; of a matter of which the defendant had no particular knowledge, but of which many men will be of many minds, and which is often governed by whim and caprice.

(b) See *Power v. Barham*, 4 A. & E. 473; and *ante*, p. 53.

Judgment or opinion, in such case, implies no knowledge. And here this case differs materially from that in Yelverton: my brother Grose considers this assertion as mere matter of opinion only; but I differ from him in that respect; for it is stated on this record that the defendant knew that the fact was false. The case in Yelv. admits that if there had been fraud it would have been otherwise. The case of *Crosse v. Gardner*, Carth. 90, was upon an affirmation that oxen, which the defendant had in his possession, and sold to the plaintiff, were his, when in truth they belonged to another person. The objection against the action was, that the declaration neither stated that the defendant *deceitfully* sold them, nor that he *knew* them to be the property of another person; and a man may be mistaken in his property and right to a thing *without any fraud or ill intent*. *Ex concessis*, therefore, if there were fraud or deceit, the action would lie; and knowledge of the falsehood of the thing asserted is fraud and deceit. But, notwithstanding these objections, the court held that the action lay, because the plaintiff had no means of knowing to whom the property belonged but only by the possession. And in Cro. Jac. 474, it was held that affirming them to be his, knowing them to be a stranger's, is the offence, and cause of action. The case of *Medina v. Stoughton* (c), in the point of decision, is the same as *Crosse v. Gardner*: but there is an *obiter dictum* of Holt, C. J., that, where the seller of a personal thing is out of possession, it is otherwise, for there may be room to question the seller's title, and *caveat emptor* in such case to have an express warranty or a good title. This distinction by Holt is not mentioned by Lord Raym. 593, who reports the same case: and if an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion: and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. These cases then are so far from being authorities against the present action, that they show that, if there be fraud or deceit, the action will lie; and that knowledge of the falsehood of the thing as-

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serted is fraud and deceit. Collusion then is not necessary to constitute fraud. In the case of a conspiracy, there must be a collusion between two or more to support an indictment: but, if one man alone be guilty of an offence, which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. That knowledge of the falsehood of the thing asserted constitutes fraud, though there be no collusion, is further proved by the case of *Risney v. Selby*, 1 Salk. 211, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was 30*l. per annum* when it was only 20*l. per annum*, and the plaintiff had his judgment; for the value of the rent is a matter which lies in the private knowledge of the landlord and tenant, and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated, nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information; but the judgment proceeded wholly upon the ground that the defendant knew that what he asserted was false. And by the words of the books it seems that, if the tenant had said the same thing, he also would have been liable to an action. If so, that would be an answer to the objection, that the defendant in this case had no interest in the assertion which he made. But I shall not leave this point on the *dictum* or inference which may be collected from that case. If A. by fraud and deceit cheat B. out of 1,000*l.*, it makes no difference to B. whether A., or any other person, pockets that 1,000*l.* He has lost his money, and if he can fix fraud upon A., reason seems to say that he has a right to seek satisfaction against him. Authorities are not wanting on this point. 1 Roll. Abr. 91, pl. 7. If the vendor affirm that the goods are the goods of a stranger, his friend, and that he had authority from him to sell them, and upon that B. buy them, when in truth they are the goods of another, yet if he sell them fraudulently and falsely on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them knowing them to be the goods of the stranger, yet B. shall have an action for this deceit. It is not clear from this case,

whether the fraud consisted in having no authority from his friend, or in knowing that the goods belonged to another person: what is said at the end of the case only proves that *falsely* and *fraudulently* are equivalent to *knowingly*. If the first were the fact in the case—namely, that he had no authority—the case does not apply to this point; but if he had an authority from his friend, whatever the goods were sold for his friend was entitled to, and he had no interest in them. But, however that might be, the next case admits of no doubt. For in 1 Roll. Abr. 100, pl. 1, it was held, that if a man acknowledge a fine in my name, or acknowledge a judgment in an action in my name, of my land, this shall bind me for ever; and therefore I may have a writ of deceit against him who acknowledged it; so if a man acknowledge a recognizance, statute-merchant, or staple. There is no foundation for supposing that in that case the person acknowledging the fine or judgment was the same person to whom it was so acknowledged. If that had been necessary it would have been so stated; but if it were not so, he who acknowledged the fine had no interest in it. Again, in 1 Roll. Abr. 95, l. 25, it is said, if my servant lease my land to another for years, reserving a rent to me, and, to persuade the lessee to accept it, he promise that he shall enjoy the land without incumbrances; if the land be encumbered, &c., the lessee may have an action on the case against my servant, because he made an express warranty. Here then is a case in which the party had no interest whatever. The same case is reported in Cro. Jac. 425, but no notice is taken of this point; probably because the reporter thought it immaterial whether the warranty be by the master or servant. And if the warranty be made at the time of the sale or before the sale, and the sale is upon the faith of the warranty, I can see no distinction between the cases. The gist of the action is fraud and deceit, and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater. But it was objected to this declaration that if there were any fraud, the nature of it is not stated; to this the declaration itself is so direct an answer that the case admits of no other. The fraud is, that the defendant procured the plaintiffs to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which he knew to be

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false. Here then is the fraud, and the means by which it was committed; and it was done with a view to enrich Falch by impoverishing the plaintiffs, or, in other words, by cheating the plaintiffs out of their goods. The cases which I have stated, and Sid. 146, and 1 Keb. 522, prove that the declaration states more than is necessary; for *fraudulenter* without *sciens*, or *sciens* without *fraudulenter*, would be sufficient to support the action. But, as Mr. J. Twisden said in that case, the fraud must be proved. The assertion alone will not maintain the action; but the plaintiff must go on to prove that it was false, and *that the defendant knew it to be so*: by what means that proof is to be made out in evidence need not be stated in the declaration. Some general arguments were urged at the bar to show that mischiefs and inconveniences would arise if this action were sustained: for if a man, who is asked a question respecting another's responsibility, hesitate or is silent, he blasts the character of the tradesman; and if he say that he is insolvent, he may not be able to prove it. But let us see what is contended for: it is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbour, and yet not be answerable for it. This is as repugnant to law as it is to morality. Then it is said that the plaintiffs had no right to ask the question of the defendant. But I do not agree in that; for the plaintiffs had an interest in knowing what the credit of Falch was. It was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant undoubtedly had his option to give an answer to the question, or not; but if he gave none, or said he did not know, it is impossible for any court of justice to adopt the possible inferences of a suspicious mind as a ground for grave judgment. All that is required of a person in the defendant's situation is that he shall give no answer, or that, if he do, he shall answer according to the truth as far as he knows. The reasoning in the case of *Coggs v. Barnard*, which was cited by the plaintiff's counsel, is, I think, very applicable to this part of the case. If the answer import insolvency, it is not necessary that the defendant should be able to prove that insolvency to a jury; for the law protects a man in giving that answer if he does it in confidence and without

malice. No action can be maintained against him for giving such an answer, unless express malice can be proved. From the circumstance of the law giving that protection, it seems to follow, as a necessary consequence, that the law not only gives sanction to the question, but requires that, if it be answered at all, it shall be answered honestly. There is a case in the books, which, though not much to be relied on, yet serves to show that this kind of conduct has never been thought innocent in Westminster Hall. In *R. v. Gunston*, 1 Str. 583, the defendant was indicted for pretending that a person of no reputation was Sir J. Thornycraft, whereby the prosecutor was induced to trust him; and the court refused to grant a *certiorari*, unless a special ground were laid for it. If the assertion in that case had been wholly innocent, the court would not have hesitated a moment. How indeed an indictment could be maintained for that I do not well understand; nor have I learnt what became of it (*d*). The objection to the indictment is, that it was merely a private injury; but that is no answer to an action. And if a man will wickedly assert that which he knows to be false, and thereby draws his neighbour into a heavy loss, even though it be under the specious pretence of serving his friend, I say *ausis talibus istis non jura subserviunt*.

ASHHURST, J. The objection in this case, which is to the third count in the declaration, is that it contains only a *bare assertion*, and does not state that the defendant had any *interest*, or that he *colluded* with the other party who had. But I am of opinion that the action lies, notwithstanding this objection. It seems to me that the rule laid down by Croke, J., in *Bayly v. Merrel* (*e*), is a sound and solid principle—namely, that fraud without damage, or damage without fraud, will not found an action; but where both concur, an action will lie. The principle is not denied by the other judges, but only the application of it, because the party injured there, who was the carrier, had the means of attaining *certain knowledge* in his own power—namely, by weighing the goods; and therefore it was a foolish credulity against which the law will not relieve. But that is not the case here, for it is expressly charged that the defendant *knew* the

(*d*) The indictment, I suppose, must have been for conspiracy.

(*e*) 3 Bulst. 95, Cro. Jac. 386.

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falsity of the allegation, and which the jury have found to be true; but *non constat* that the plaintiffs knew it, or had any means of knowing it, but trusted to the veracity of the defendant. And many reasons may occur why the defendant might know that fact better than the plaintiffs: as if there had before this event subsisted a partnership between him and Falch, which had been dissolved: but at any rate it is stated as a fact that he knew it. It is admitted that a fraudulent affirmation, when the party making it has an interest, is a ground of action; as in *Risney v. Selby* (*f*), which was a false affirmation made to a purchaser as to the rent of a farm which the defendant was in treaty to sell to him. But it was argued that the action lies not, unless where the party making it has an interest, or colludes with one who has. I do not recollect that any case was cited which proves such a position; but if there were any such to be found, I should not hesitate to say that it could not be law; for I have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty. For the gist of the action is *the injury done to the plaintiff*, and not whether the defendant meant to be a gainer by it: what is it to the plaintiff whether the defendant was or was not to gain by it? the injury to him is the same. And it should seem that it ought more emphatically to lie against him, as the malice is more diabolical, if he had not the temptation of gain. For the same reason, it cannot be necessary that the defendant should collude with one who has an interest. But if collusion were necessary, there seems all the reason in the world to suppose both interest and collusion from the nature of the act: for it is to be hoped that there is not to be found a disposition so diabolical as to prompt any man to injure another without benefiting himself. But it is said that, if this be determined to be law, any man may have an action brought against him for telling a lie by the crediting of which another happens eventually to be injured. But this consequence by no means follows: for, in order to make it actionable, it must be accompanied with the circumstances averred in this count, namely, that the defendant, “intending to deceive and defraud the plaintiffs, did deceitfully encourage and

(*f*) 1 Salk. 211.

persuade them to do the act, and for that purpose made the false affirmation, in consequence of which they did the act." Any lie accompanied with those circumstances I should clearly hold to be the subject of an action ; but not a mere lie thrown out at random without any intention of hurting anybody, but which some person was foolish enough to act upon, for the *quo animo* is a great part of the gist of the action. Another argument which has been made use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new in their *principle*, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance ; but where the case is only new in the *instance*, and the only question is upon the application of a principle recognised in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago ; if it were not, we ought to blot out of our law-books one-fourth part of the cases that are to be found in them. The same objection might, in my opinion, have been made with much greater reason in the case of *Coggs v. Barnard* ; for there the defendant, so far from meaning an injury, meant a kindness, though he was not so careful as he should have been in the execution of what he undertook. And, indeed, the principle of the case does not, in my opinion, seem so clear as that of the case now before us, and yet that case has always been received as law. Indeed, one great reason, perhaps, why this action has never occurred, may be that it is not likely that such a species of fraud should be practised unless the party is in some way interested. Therefore, I think the rule for arresting the judgment ought to be discharged.

LORD KENYON, C. J. I am not desirous of entering very fully into the discussion of this subject, as the argument comes to me quite exhausted by what has been said by my brothers. But still I will say a few words as to the grounds upon which my opinion is formed. All laws stand on the best and broadest basis which go to enforce moral and social duties, though indeed it is not every moral and social duty the neglect of which is the ground of an action. For there are some, which are called in the civil law duties of imperfect obligation, for the enforcing of which no action lies. There are many cases where the pure

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effusion of a good mind may induce the performance of particular duties, which yet cannot be enforced by municipal laws. But there are certain duties, the non-performance of which the jurisprudence of this country has made the subject of a civil action. And I find it laid down by the Lord C. B. Comyns (*g*), that "an action upon the case for a deceit lies when a man does any deceit to the damage of another." He has not, indeed, cited any authority for this opinion; but his opinion alone is of great authority, since he was considered by his contemporaries as the most able lawyer in Westminster Hall. Let us, however, consider whether that proposition is not supported by the invariable principle in all the cases on this subject. In 3 Bulstr. 95, it was held by Croke, J., that "fraud without damage, or damage without fraud, gives no cause of action: but where these two do occur, there an action lieth." It is true, as has been already observed, that the judges were of opinion in that case that the action did not lie on other grounds. But consider what those grounds were. Dodderidge, J., said, "If we shall give way to this then every carrier would have an action upon the case: but he shall not have any action for this, because it is merely *his own default* that he did not weigh it." Undoubtedly where the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence (*h*). And in that case, as reported in Cro. Jac. 386, the negligence of the plaintiff himself was the cause for which the court held that the action was not maintainable. Then how does the principle of that case apply to the present? There are many situations in life, and particularly in the commercial world, where a man cannot by any diligence inform himself of the degree of credit which ought to be given to the persons with whom he deals; in which cases he must apply to those whose sources of intelligence enable them to give that information. The law of prudence leads him to apply to them, and the law of morality ought to induce them to give the information required. In the case of Bulstrode, the carrier might have weighed the goods himself; but in this case the plaintiffs had no means of knowing the state of Falch's

(*g*) Com. Dig., tit., "Action upon the case for a deceit," A. 1.

(*h*) On this principle depends *Priestley v. Fowler*, 3 M. & W. 1.

credit, but by an application to his neighbours. The same observation may be made to the cases cited by the defendant's counsel respecting titles to real property. For a person does not have recourse to common conversations to know the title of an estate which he is about to purchase : but he may inspect the title deeds ; and he does not use common prudence if he rely on any other security. In the case of *Bulstrode*, the court seemed to consider that *damnum* and *injuria* are the grounds of this action ; and they all admitted that, if they had existed in that case, the action would have lain there ; for the rest of the judges did not controvert the opinion of Croke, J., but denied the application of it to that particular case. Then it was contended here that the action cannot be maintained for telling a naked lie ; but that proposition is to be taken *sub modo*. If, indeed, no injury is occasioned by the lie it is not actionable : but if it be attended with a damage, it then becomes the subject of an action. As calling a woman a whore, if she sustain no damage by it, it is not actionable (i) : but if she lose her marriage by it, then she may recover satisfaction in damages. But in this case the two grounds of the action concur : here are both the *damnum et injuria*. The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desiring to be informed of his credit, when the defendant *fraudulently*, and knowing it to be otherwise, *and with a design to deceive* the plaintiffs, made the false affirmation which is stated on the record, by which they sustained a considerable damage. Then can a doubt be entertained for a moment but that this is injurious to the plaintiffs ? If this be not an injury, I do not know how to define the word. Then, as to the loss, this is stated in the declaration, and found by the verdict. Several of the words stated in this declaration, and particularly "*fraudulenter*," did not occur in several of the cases cited. It is admitted that the defendant's conduct was highly immoral and detrimental to society. And I am of opinion that the action is maintainable, on the grounds of deceit in the defendant and injury and loss to the plaintiffs.

Rule for arresting the judgment discharged.

(i) See now, however, the Slander of Women Act, 1891.

Effect of decision on Stat. of Frauds.

As to the effect produced by this celebrated decision on the operation of the Statute of Frauds, and by Lord Tenterden's Act (9 Geo. 4, c. 14, s. 6) upon the class of cases of which this is the leading one, see the notes to *Chandelor v. Lopus*, ante, p. 55.

Action of deceit.

Pasley v. Freeman is the leading case on the subject of the common law action of deceit. That form of action must be clearly distinguished, on the one hand, from the common law action for a breach of warranty (as to which see the notes to *Chandelor v. Lopus*, ante, p. 53), and, on the other hand, from the equitable action for the rescission of a contract on the ground that the plaintiff was induced to enter into it by a material misrepresentation (as to which, see *post*, p. 81).

What is fraud.

With respect to actions upon the case for a false representation, although the declaration always imputed to the defendant fraud and an intent to deceive the plaintiff, and although it is expressly laid down that "fraud and falsehood must concur to sustain this action" (*per* Gibbs, C.J., *Ashlin v. White*, Holt, N. P. 387), still, in order to prove such fraud as the law considers sufficient to sustain the action, it is only necessary to show that what the defendant asserted was false within his own knowledge; *Haycraft v. Creasy*, 2 East, 92; *Foster v. Charles*, 6 Bing. 396, 7 Id. 105; *Corbett v. Brown*, 8 Id. 33; *Polhill v. Walter*, 3 B. & Ad. 114, 123; and *Crawshay v. Thompson*, 4 M. & Gr. 357, 387; or was asserted by him recklessly without any knowledge whatever upon the subject; *per* Maule, J., *Evans v. Edmonds*, 13 C. B. 777, 786; see *per* Lord Cairns, *Reese River Co. v. Smith*, L. R. 4 H. L. 64, 79; and *per* Lord Herschell, *Derry v. Peek*, 14 App. Cas. 337, 368, 371, 374; or without belief that it was true; *per* Parke, B., *Taylor v. Ashton*, 11 M. & W. 401, 415 (where, in line 30, correct "true" into "untrue"); see *per* Lord Herschell, 14 App. Cas. 367, 374; and with an intention to induce another to act on the faith of it and alter his position, *per* Parke, B., *Thom v. Bigland*, 8 Exch. 725, 731 (as corrected, 9 Exch. 426, n.); and that it occasioned damage to the plaintiff; *per* Croke, J., 3 Bulstr. 95, cited ante, pp. 69, 75, and in *Smith v. Chadwick*, 9 App. Cas. 187, 195, and *Derry v. Peek*, 14 Id. 343, 363; see *Collins v. Cave*, 4 H. & N. 225, 6 Id. 131; *Eastwood v. Bain*, 28 L. J. Ex. 74. For this purpose it must appear that the plaintiff relied upon it; see *Attwood v. Small*, 6 Cl. & F. 232;

Plaintiff must have relied upon it.

Shrewsbury v. Blount, 2 Scott, N. R. 588; *Arnison v. Smith*, 41 Ch. D. 348, 369; though it seems that the fact of a misrepresentation having been made and a course pursued into which that misrepresentation was calculated to mislead is *primâ facie* evidence that the plaintiff was misled by it; *Watson v. Charlemont*, 12 Q. B. 856; *Arnison v. Smith*, *supra*. It need not be in terms *expressly* stating the existence of some untrue fact; see *per* Crompton, J., *Lee v. Jones*, 34 L. J. C. P. 131. "Half a truth will sometimes amount to a real falsehood;" *per* Lord Chelmsford, *Peek v. Gurney*, L. R. 6 H. L. 377, 392.

For the distinction between the common law action for deceit, and the rules of equity applicable to the rescission of contracts on the ground of misrepresentation, see *Redgrave v. Hurd*, 20 Ch. D. 1; *Smith v. Land Corporation*, 28 Id. 7; *Reese River Co. v. Smith*, L. R. 4 H. L. 64, 79; *Lamare v. Dixon*, 6 Id. 414; *Arkwright v. Newbold*, 17 Ch. D. 301. It is not necessary in the latter case to show that the person making a material misrepresentation, upon which another has acted, knew it to be false; it is sufficient if it be false in fact. Nor is it an answer to the person seeking to rescind, that he was careless in availing himself of means of knowledge which might have shown him, had he been more diligent, that the representation was untrue; *Redgrave v. Hurd*, *supra*. See also the notes to *Chandelor v. Lopus*, *ante*, p. 58.

A singular case occurred some time ago, in the Court of Exch., in which the majority of the judges decided that a contract made by an agent on behalf of his principal, and into which the contractee was induced to enter by a representation, which, though false within the knowledge of the principal, was not so within that of the agent, was not void on the ground of fraud; for it was argued there was no fraud in the agent, since he thought he was telling the truth, nor any in the principal, since he did not make the representation. Lord Abinger thought, upon the other hand, that the contract being procured by misrepresentation must be tainted with legal, if not moral, fraud. The case was *Cornfoot v. Fowke*, 6 M. & W. 358, and the facts were as follows:—The plaintiff (the owner of a ready-furnished house) had employed an agent to let it for him, and the agent had let it to the defendant. The adjoining house was used as a brothel, and this fact was known to the plaintiff, but not to the agent. Before the agreement to take the

Rescission of contract on ground of misrepresentation.

Principal and agent. False representation.

Cornfoot v. Fowke.

house was signed by the defendant, he had asked the agent whether there was any objection to the house, and he had answered that there was not. The action was brought against the defendant for the non-performance of his agreement, and he pleaded that he had been induced to enter into the contract by the fraud of the plaintiff.

Legal and
moral fraud.

This case was by no means universally admitted as law. Accordingly, few cases have excited more animated discussion; in the course of which the question seems to have been—May a misrepresentation be fraudulent in law, so as to invalidate a contract, or furnish a ground of action, without moral fraud?

Conflict be-
tween Queen's
Bench and
Exchequer.

In *Fuller v. Wilson*, 3 Q. B. 58, which was an action on the case for a false representation, the facts were assumed to raise this question, and the Q. B., in a considered judgment, differed from the view taken by the majority of the Court of Exch. in *Cornfoot v. Fowke*, adopting the opinion of the Chief Baron upon that question. "Lord Abinger maintained," said Lord Denman, delivering the judgment of the court, "and surely not without reason, that there was some moral fraud in the conduct of both, the principal concealing a fact which made his house utterly unfit for the purpose for which he was letting it; the agent stating a falsehood, which, of course he could not know to be true, even if he believed it; we do not, however, take this ground: we adopt the other proposition of the Chief Baron, namely, that *whether there was moral fraud or not*, if the purchaser was actually deceived in his bargain, the law will relieve him from it. We think the principal and his agent are for this purpose completely identified; and that the question is, not what was passing in the mind of either, but whether the purchaser was in fact deceived by them, or either of them." The facts of the case were afterwards stated in a special verdict, and the judgment was reversed in error, but on a different point; see 3 Q. B. 68, 1009.

Evans v.
Collins.
Allegation of
knowledge
held imma-
terial by
Queen's
Bench.

Meanwhile, the Court of Exch., in *Moens v. Heyworth*, 10 M. & W. 147 (Lord Abinger still dissentient), and in *Taylor v. Ashton*, 11 Id. 401, reiterated their previous opinion as delivered in *Cornfoot v. Fowke*, whilst the Q. B., soon afterwards, in *Evans v. Collins*, 5 Q. B. 804, adhered to their former judgment upon this question. That was an action on the case brought by the plaintiff, late Sheriff of London, against the defendants, attorneys for one P., who had sued J. W. for a debt, and obtained execution against

him, for falsely representing another J. W. (who was then in custody of the plaintiff) to be the defendant in that action, *though they knew the contrary*; by which false representation the plaintiff was induced to detain the wrong person, who thereupon brought an action against him, and therein recovered (by way of compromise) 10*l.* in respect of the unlawful imprisonment. To this declaration the defendants pleaded that they had reasonable and probable cause to believe, and did believe, that the person whom they pointed out was the real defendant. Upon this plea the defendants had a verdict, but the court held the allegation in the declaration of the *knowledge* of the defendants, as well as the issue upon the above plea, to be *immaterial*, and gave judgment for the plaintiff upon that issue, *non obstante veredicto*.

Upon a writ of error, however, the Exch. Cham. (5 Q. B. 804) held the allegation of the scienter in the declaration, and the issue on the above plea, to be material; and, distinguishing the case from *Humphrys v. Pratt*, 5 Bligh, N. S. 154 (upon the authority of which the judgment in the court below had partly proceeded), as being the case of a direction to a mandatory or agent and not a mere representation, reversed the decision of the Q. B. See also *Shrewsbury v. Blount*, 2 M. & Gr. 475, and *Rawlings v. Bell*, 1 C. B. 951, where the Court of C. P. held that injury caused by a statement false in fact, but not so to the knowledge of the party making it, nor made with intent to deceive, would not support an action.

Overruled in
Cam. Scac.

In *Ormrod v. Huth*, 14 M. & W. 651, the Exch. Cham. again affirmed the same principle, in a judgment to which the judges of the Q. B. were, it is apprehended, parties; and in *Barley v. Walford*, 9 Q. B. 197, the Q. B. acquiesced distinctly in the propriety of the doctrine, that *moral fraud* in a representation is essential, in order thereby to furnish ground of action; so that the result of the elaborate discussion of this subject was to leave the law very much as it was laid down in the principal case, and in *Haycraft v. Creasy*, 2 East, 92. Accord. *Childers v. Wooler*, 2 E. & E. 287, a case very similar in its facts to *Evans v. Collins*.

Now settled
that moral
fraud essen-
tial.

The supposed distinction between legal and moral fraud has been the source of some confusion. There is no such thing as fraud into which some degree of moral obliquity does not enter. Accordingly (subject to what will appear hereafter as to the responsibility of an innocent principal

Legal and
moral fraud.

What constitutes fraud.

for the fraud of his agent), an action of deceit will not lie for a perfectly innocent misrepresentation, for such a representation is not fraudulent. On the other hand, a very slight degree of moral obliquity may suffice to render a representation fraudulent in contemplation of law. It is not necessary that it should be false to the knowledge of the party making it. If it be untrue in fact, and *not believed to be true* by the party making it, or made recklessly without any knowledge on the subject and for the purpose of inducing another person to act upon it, an action may be maintained thereon by the person who has been induced to act upon it. For some pointed observations on the impropriety of the expression "legal fraud," see *per* Bramwell, L.J., *Weir v. Bell*, 3 Ex. D. 238, 243, cited in *Joliffe v. Baker*, 11 Q. B. D. 255, 270. Still, as those facts which the law regards as sufficient to support an action for deceit need not necessarily amount to what in popular language would be called fraud, the expression is a convenient one whereby to indicate the legal as distinguished from the popular notion of fraud.

The above view of what constitutes fraud in order to enable an action of deceit to be maintained has now been declared to be correct by the H. L. in *Derry v. Peek*, 14 App. Cas. 337; see especially *per* Lord Herschell, at p. 374.

Derry v. Peek.

In *Derry v. Peek*, the dispute was whether a false representation, honestly believed in by the person making it, could form the ground of an action of deceit, if made without reasonable grounds for believing it to be true. The H. L., reversing the decision of the C. A. (37 Ch. D. 541), held that it could not, because the want of reasonable grounds for belief does not in itself constitute fraud, though there may be such an absence of reasonable grounds for a man's belief, as, in spite of his assertion to the contrary, shows that he had not really the belief which he alleges. But a man who forms his belief carelessly, or is unreasonably credulous, though he may be blameworthy when he makes a representation on which another is to act, is still not fraudulent, in the sense which that word must bear in order to make him liable in an action of deceit. See especially *per* Lord Herschell, 14 App. Cas., p. 369.

Want of reasonable grounds for a belief *bonâ fide* entertained, not fraud.

This decision makes it clear that there must be *fraud* to support an action of deceit, and sets at rest the doubt as to the effect of want of reasonable grounds for belief which had arisen through the *dicta* of Lord Chelmsford in *Western Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. 145, 162; of

Lord Cairns in *Reese River Co. v. Smith*, L. R. 4 H. L. 64, 79, and *Peek v. Gurney*, 6 Id. 377, 409; of Cotton, L.J., in *Arkwright v. Newbold*, 17 Ch. D. 301, 322; and of Jessel, M.R., in *Smith v. Chadwick*, 20 Ch. D. 27, 44. But, as Lord Herschell pointed out in *Derry v. Peek*, some of the *dicta* did not really bear the construction which had been put upon them, and were made in cases where the question was, not whether an action lay for deceit, but whether a contract could be rescinded in equity for misrepresentation.

In *Angus v. Clifford*, (1891) 2 Ch. 449, the C. A. discussed the meaning of "making a representation recklessly without knowledge on the subject." It does not mean mere stupidity or carelessness, however gross. It means, in the words of Bowen, L.J., "some indifference to the truth which amounts to dishonesty;" "the moral obliquity which consists in a wilful disregard of the importance of truth;" or, in words of Kay, L.J., "an indifference in the mind of the man who makes the statement whether the statement was false or true, without knowing whether it was true or false, and without caring." See also *Glasier v. Rolls*, 42 Ch. D. 436; *Low v. Bouverie*, (1891) 3 Ch. 82; and *Le Lievre v. Gould*, (1893) 1 Q. B. 491.

"Reckless" representation.

The doctrine that moral fraud in a representation is necessary to invalidate a contract or furnish ground of action cannot at all be extended to those cases in which the representation expressly or impliedly forms part of the contract between the parties, as cases of insurance; or the like; see *per Parke, B., Moens v. Heyworth*, 10 M. & W. 157; nor does it apply to cases of warranty or of estoppel; *Low v. Bouverie*, (1891) 3 Ch. 82. In cases where averments of fraud are made, though not essential to the cause of action, they need not be proved; *Anderson v. Thornton*, 8 Exch. 425; *Swinfen v. Chelmsford*, 5 H. & N. 890, 920.

Limits of doctrine that fraud must be proved.

It will be observed that the above discussion does not involve the whole of the doctrine promulgated by the majority of the court in *Cornfoot v. Fowke*, *supra*, p. 81, so far as that doctrine draws a distinction between the knowledge of the principal and that of the agent, and requires that the fraud and the statement should be those of the same individual. See *Wilde v. Gibson*, 1 H. L. C. 605; *Grant v. Norway*, 10 C. B. 665; *Howard v. Tucker*, 1 B. & Ald. 712.

Distinction between knowledge of principal and of agent doubted.

In *National Exchange Co. v. Drew*, 2 Macq. 103, observations were made which throw much light upon the principle

Cornfoot v. Fowke, explained in *National Exchange Co. v. Drew*.

of *Cornfoot v. Fowke*. “In *Cornfoot v. Fowke*,” said Lord Cranworth, “the plea was that the defendant had been induced to enter into the agreement sued on by the fraud and covin of the plaintiff. The evidence proved nothing to support that plea; for the plaintiff had merely put the house into the hands of an agent to be let at a stipulated rent. He had neither himself stated, nor authorised the agent to state, anything false or deceptive. The court held that the plea was not made out by evidence, which merely showed the agent to have stated (what he believed to be true), namely, that there was no objection attaching to the house.” And Lord St. Leonards, after referring to the distinction between fraud and misrepresentation, and stating that it was not denied in the judgment in *Cornfoot v. Fowke*, as he understood it, that the principal would have been responsible if he had employed an ignorant agent for the purpose of concealing a fact material to the value of the property, proceeded as follows: “But I should take the liberty of going a good deal further. I should say that if in that case fraud had not been alleged, but it had been put upon misrepresentation, and the fact was, that a man, knowing that there is so serious a nuisance affecting a house as to diminish its value in such a way that no man of respectability could live in it, and he takes care himself not to make the contract, but leaves it to an agent whom he has no reason to suppose is aware of the fact; and if in the course of the treaty for the contract, the agent being asked if such a fact existed, states positively no, and the contract is executed in silence upon the point, because the purchaser’s or the tenant’s vigilance has been lulled to sleep upon it, and he believes the representation made to him by the agent, I say, in such a case as that, I should be very much shocked at the law of England if I could bring myself to believe that it would not reach the case of a person so availing himself of a misrepresentation of his own agent, who might be ignorant of the fact, although the principal himself knew it, and employed the agent in order to avoid making a direct representation to the contrary. . . . I should feel no hesitation, if I had myself to decide that case, in saying, that although the representation was not fraudulent—the agent not knowing that it was false—yet that, as it in fact was false, and false to the knowledge of the principal, it ought to vitiate the contract.”

In *Cornfoot v. Fowke* the question discussed was, as we

have seen, the effect of an innocent but untrue statement by an agent, when coupled with a knowledge on the part of the principal, which would clearly have been sufficient to support an action of deceit against him, had he himself made or authorized the statement complained of. In *Udell v. Atherton*, 7 H. & N. 172, the question arose as to the liability of innocent principals to an action of deceit for a false and fraudulent representation made by their agent as to the quality of goods sold by him, the principals having adopted the contract, and received part of the price. The defendants employed an agent to sell timber on commission, who sold it to the plaintiff and fraudulently represented it to be sound, although he knew it to be defective. The buyer did not discover the defect until after he had paid part of the price. He then complained to the principals, who stated, as was true, that they had neither authorised nor wished their agent to sell wood as sound which was defective; but they insisted on payment of the whole price. Upon these facts the judges of the Court of Exch. differed as to whether the principals were liable in an action of deceit. The true rule was, however, it is apprehended, laid down by Wilde, B., who held that the action would lie on the ground that the principals, having adopted the sale made by the agent and received the price, were responsible for the fraud committed by the agent in making the contract, by which fraud alone the contract was obtained; and that consequently the false affirmation by the agent might be treated as a false affirmation made by the principals themselves. The authorities in support of this view, which were numerous, but not very direct, are collected in Baron Wilde's judgment, which will repay perusal.

Udell v. Atherton.
Liability of innocent principal for deceit of agent.

In *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, Willes, J., in delivering the judgment of the Exch. Cham., distinguished the opinions of Martin and Bramwell, BB., in *Udell v. Atherton*, on the ground that in that case the agent was not the general agent of the defendants, and that his act had been adopted under peculiar circumstances, and laid it down that for fraudulent misrepresentations made by an agent in the ordinary course of his employment for his master's benefit, the principal is responsible, in the same manner as he is for any other wrong committed by his servant. In the same case the same learned judge is reported to have said: "I should be sorry to have it supposed that *Cornfoot v. Fowke* turned upon anything but a point of pleading."

Barwick v. English Joint Stock Bank.

Weir v. Bell.

In *Weir v. Bell*, 3 Ex. D. 238, Bramwell, L.J., criticized the principle on which the judgment of the Exch. Cham. was rested in *Barwick v. English Joint Stock Bank*, pointing out that fraud is essentially a wilful act, and that, as a general rule, a master is not responsible for the wilful act of his servant; and he suggested that the true principle upon which a person, who has committed no fraud himself, may be held responsible for the fraud of his agent, is, that he impliedly contracts that his agent will not be guilty of fraud. If, however, the principle laid down in *Barwick v. English Joint Stock Bank* be confined, as it expressly was in that case, to acts done by the agent or servant strictly within the scope of his employment, it seems scarcely open to this criticism. Scope of employment has undoubtedly received, in many cases, an interpretation wide enough to embrace within it acts done without or even in direct violation of the master's order; see the notes to *Armory v. Delamirie*, ante, vol. i, p. 352; and if such be the law, it seems no more unreasonable to hold the principal responsible, on the ordinary rule of *respondeat superior*, for the frauds of his agent committed within the scope of his employment, than to resort to the fiction of a contract which is not made in fact. In *Weir v. Bell*, it was held by the C. A. (Cotton, L.J., dissenting), that a director of a company was not responsible for fraudulent misstatements, which were made without his knowledge, and from which he personally derived no benefit, in a prospectus, prepared by brokers, inviting subscriptions for debentures of the company. The company had, by resolution, authorised the directors to issue debentures, and the directors had thereupon instructed brokers to place them. The majority of the C. A. held (affirming the decision below, 3 Ex. D. 32), that the directors were themselves merely agents of the company in instructing the brokers, and did not stand to the latter in the relation of principals, so as to render themselves responsible without actual fraud. Cotton, L.J., was, however, of opinion that the directors who employed the brokers were personally responsible for their fraudulent misstatements. See also *Cargill v. Bower*, 10 Ch. D. 502; *Mullens v. Miller*, 22 Id. 194.

Principle of
Barwick v.
English J.
S. B. now
well esta-
blished.

The rule laid down in *Barwick v. English Joint Stock Bank* has been accepted and acted upon in several cases, and may now be treated as established law. It was fully approved of by the J. C. in *Mackay v. Commercial Bank*, L. R. 5 P. C. 394, and *Swire v. Francis*, 3 App. Cas. 106. In

Houldsworth v. Glasgow Bank, 5 App. Cas. 317, 326, Lord Selborne considered it to be a well recognized principle of the law of agency. See also *Swift v. Winterbotham*, L. R. 8 Q. B. 244, 254; *Swift v. Jewsbury*, 9 Id. 301, 312; *Blake v. Albion Life Co.*, 4 C. P. D. 94, 109; *Newlands v. Nat. Employers' Assoc.*, 54 L. J. Q. B. 428; *Shaw v. Port Philip*, 13 Q. B. D. 103, 108; *Blackburn v. Vigors*, 17 Id. 559, *per* Lord Esher.

The rule, however, is subject to this qualification, that a principal is not liable for the fraud of his agent committed, not for the principal, but for the agent's own purposes; *British Mutual Bank v. Charnwood Forest R. Co.*, 18 Q. B. D. 714; *Thorne v. Heard*, (1894) 1 Ch. 599, (1895) A. C. 495, 502. Limits of principle.

An agent, acting within the scope of his employment, is not personally liable for an innocent misrepresentation; *Eaglesfield v. Londonderry*, H. L., 26 W. R. 540. Innocent representation by agent.

As to fraudulent misrepresentations made in order to induce persons to become subscribers to public companies, in addition to the cases previously cited, see *Wontner v. Shairp*, 4 C. B. 404; *Edgington v. Fitzmaurice*, 29 Ch. D. 459. And as to fraudulent suppression for the same purpose, *Jarrett v. Kennedy*, 6 C. B. 319; *Craig v. Phillips*, 3 Ch. D. 722; *Erlanger v. New Sombrero Co.*, 3 App. Cas. 1218. As to what amounts to a fraudulent suppression under s. 38 of the Companies Act, 1867, see *Gover's Case*, 1 Ch. D. 182; *Twycross v. Grant*, 2 C. P. D. 469; *Sullivan v. Mitcalfe*, 5 Id. 455. Public companies.
Fraudulent suppression.

The averment that a misrepresentation was made to the plaintiff may be proved without showing that the statement complained of was addressed to the plaintiff individually; for a statement to the public at large is in effect a statement to every individual whom it reaches; see the judgment in *Gerhard v. Bates*, 2 E. & B. 476; *McKune v. Joynson*, 5 C. B. N. S. 218; *New Brunswick R. Co. v. Conybeare*, 9 H. L. C. 711; *Central Railway Co. v. Kisch*, L. R. 2 H. L. 99; and *Scott v. Dixon*, 29 L. J. Ex. 62, n. (3), where the director of a banking company was held liable to a person who was not a shareholder in the company for having made a misrepresentation in a report which was only addressed to the shareholders, but was intended for the information of all who were likely to have dealings with the bank. In *Denton v. G. N. R. Co.*, 5 E. & B. 860, the fraudulent representation was the advertisement in a time table, Misrepresentation to whom made.

published and kept in circulation by the defendants, of a train which had ceased to run.

In *Bagshaw v. Seymour*, 18 C. B. 903, affirmed, but without argument, in the H. L., see 29 L. J. Ex. 62, n., and in *Bedford v. Bagshaw*, 4 H. & N. 538, an action against the same defendant decided on the authority of the former cases, an action of deceit was held to lie in respect of a misrepresentation which had not been made to the plaintiff. In that case the plaintiff had been induced to purchase shares by seeing them quoted in the official list of the committee of the Stock Exchange, and the shares would not have been so quoted but for fraudulent misrepresentations made by the defendant to the committee, with intent to induce the public to purchase the shares, in the belief that their insertion in the list had been honestly procured. In *Peek v. Gurney*, however, L. R. 6 H. L. 377, it was pointed out by Lord Chelmsford that these cases could not be looked upon as binding authorities. There the directors of a company had issued a prospectus containing false representations, and it was held that the plaintiff, who was not an original allottee, but had bought shares in the market, had failed to connect himself sufficiently with the representations of the prospectus to enable him to maintain an action against the directors.

*Peek v.
Gurney.*

In *Swift v. Winterbotham*, L. R. 8 Q. B. 244, 9 Id. 301, the representation, which was held to be actionable, was made by the manager of a bank to the manager of another bank, who had made inquiries at the instance of the plaintiff, a customer. "It is well established," said Quain, J., in delivering the judgment of the court, "that in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly: it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view of its being acted on, and the plaintiff, as one of the public, acts on it, and suffers damage thereby"; see *Richardson v. Silvester*, L. R. 9 Q. B. 34.

*Swift v.
Winter-
botham.*

In *Polhill v. Walter*, 3 B. & Ad. 114, the defendant, who had formerly been in partnership with Hancorne, and still carried on business in the same house, accepted, as *per procuration* of Hancorne, a bill drawn on the latter. The bill was afterwards indorsed to the plaintiff, who gave value for it, and, upon its being dishonoured by Hancorne,

Fraudulent
acceptance
per pro.

sued the defendant for “falsely and *fraudulently* pretending to accept the same by procuration of Hancorne.” At the trial, the jury, being directed by Lord Tenterden to find for the defendant if they thought there was no fraud, otherwise for the plaintiff, found a verdict for the defendant: his Lordship giving the plaintiff leave to move to enter a verdict; which motion was accordingly made, and the rule to enter the verdict for the plaintiff ultimately made absolute.

“If,” said Lord Tenterden, delivering the judgment of the court, “the defendant when he wrote the acceptance, and thereby in substance represented that he had authority from the drawer to make it, knew that he had no such authority (and upon the evidence there can be no doubt he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.” See *Owen v. Van Uster*, 20 L. J. C. P. 61, where (*semble*) an action similar to that in *Polhill v. Walter* might have been maintained against the defendant—see *per* Maule, J.—but being himself one of the persons to whom the bill was addressed, and on whose behalf he purported to accept it, he was held personally liable as acceptor. See also *Pontifex v. Bignold*, 3 M. & Gr. 63.

As to what amounts to a false representation of fact sufficient to support an action for deceit, see *Peek v. Gurney*, L. R. 6 H. L. 377, 392, 403; *Beattie v. Ebury*, 7 Ch. 777, 804; *Ex p. Burrell*, 1 Ch. D. 537, 552; *Smith v. Land Corporation*, 28 Ch. D. 7, *per* Bowen, L.J.; *Edgington v. Fitzmaurice*, 29 Id. 459; *West London Bank v. Kitson*, 13 Q. B. D. 360; *Bellairs v. Tucker*, Id. 562, 575; *Lee v. Jones*, 34 L. J. C. P. 131, *per* Crompton, J.

What is a false representation.

As to the effect of simple concealment of defects upon a contract of sale, see *Keates v. Cadogan*, 10 C. B. 591; *Horsfall v. Thomas*, 1 H. & C. 90; or of passive acquiescence by the seller in the self-deception of the buyer, see *Smith v. Hughes*, L. R. 6 Q. B. 597. In *Ward v. Hobbs*, 2 Q. B. D. 331, 3 Id. 150, 4 App. Cas. 13, it was held (reversing the decision of the Q. B. D.), that the mere fact of exposing pigs for sale in a market, and selling them “with all faults,” by a person who knew that they were affected by a contagious disease, did not make the seller liable to an action for fraudulent misrepresentation. Mere silence as regards a material fact which the one party is not under an obligation to disclose to the other is not a misrepresentation; *Turner v. Green*, (1895) 2 Ch. 205.

Concealment of defects on sales.

Representa-
tion by
creditors to
sureties.

As to representations made by creditors to sureties, whereby they are induced to become such, or the extent of their liability is, or might be, increased; see *Stone v. Compton*, 5 B. N. C. 142; *Railton v. Matthews*, 10 Cl. & F. 934; *Hamilton v. Watson*, 12 Id. 109.

As to the remedies of the buyer of goods who has been induced to purchase by fraud, and of a shareholder in a public company who has been induced to become such by fraud or material misrepresentation, see the notes to *Chandelor v. Lopus*, ante, p. 58.

Directors'
Liability Act,
1890.
53 & 54 Vict.
c. 64.

The decision in *Derry v. Peek*, supra, led to the passing of the Directors' Liability Act, 1890, which extends the liability of directors and promoters of companies for untrue statements in a prospectus or notice.

Fraudulent
use of trade
mark.

An action on the case is maintainable by the manufacturer of goods against another manufacturer who marks his goods with the known and accustomed mark of the plaintiff, with the intention of making them pass for goods manufactured by him; and this although there is no proof of special damage; *Rodgers v. Nowill*, 5 C. B. 109; *Farina v. Silverlock*, 6 De G. M. & G. 214, 4 Kay & J. 650; *Dixon v. Fawcus*, 30 L. J. Q. B. 137; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Metzler v. Wood*, 8 Ch. D. 606. As to the statutory remedies which exist in these cases, see the Merchandise Marks Acts, 1887 and 1891; see also the Patents, Designs, and Trade Marks Acts, 1883 and 1888.

Novelty no
objection.

The expression of opinion by the court in the principal case, that the novelty of the action is no objection, the injury being clearly shown to exist, is cited in the note to *Ashby v. White*, ante, vol. i., p. 258.

Further
extension of
principle of
Pasley v.
Freeman.
Langridge v.
Levy.

In *Langridge v. Levy*, 2 M. & W. 519, 4 Id. 337, the courts carried the principle of *Pasley v. Freeman* somewhat further. It was an action for falsely and fraudulently warranting a gun to have been made by Nock, and to be a good and safe gun, and selling it as such to the plaintiff's father, *for the use of himself and sons*; one of whom (the plaintiff), confiding in the warranty, used the gun, whereupon it burst, and injured him. The action was held to lie. "If," said Parke, B., "the gun had been delivered by the defendant to the plaintiff for the purpose of being used *by him*, with an accompanying representation *to him*, that he might safely so use it, and that representation had been false to the defendant's knowledge, and the plaintiff

had acted on the faith of its being true, and had received damage thereby; then there is no question but that an action would have lain, on the principle of a numerous class of cases, of which the leading one is *Pasley v. Freeman*; which principle is, that a mere naked falsehood is not enough to give a right of action; but that it is so if it be a falsehood told with the intention that it should be acted on by the party injured, and that act must produce damage to him. If, instead of being delivered to the plaintiff *immediately*, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to, and then used by, the plaintiff*, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit; nor can it make any difference that the third person *also* was intended by the defendant to be deceived; nor does there seem to be any substantial distinction if the instrument be delivered in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. This is a false representation made by the defendant, *with a view that the plaintiff should use the instrument in a dangerous way*; and unless the representation had been made, the dangerous act would never have been done."

This is a remarkable case; it affords an instance in which a party may bring an action for the consequences of a breach of contract, who was not the contractee, and could not have sued upon the contract. It was approved and acted upon in *Pilmore v. Hood*, 5 B. N. C. 97; and is said to have proceeded "upon the ground of the *knowledge and fraud* of the defendant:" *per* Alderson, B., *Winterbottom v. Wright*, 10 M. & W. 109, 113. In that case A. built a coach for the Postmaster-General, B. horsed it, and hired C. as a coachman to drive it; the coach broke down from a defect in its construction, and C. was consequently injured; it was held that C. could not sue A.

The authority of *Langridge v. Levy* was also recognised in *Longmeid v. Holliday*, 6 Exch. 761; there the plaintiff's wife bought of the defendant a lamp for the purpose of its being used by herself and her husband: the defendant was not a manufacturer of lamps himself, but caused lamps, of which the lamp in question was one, to be put together

Langridge v. Levy.

Actions by persons not parties to contract.

Longmeid v. Holliday.

by other persons for him, from parts purchased of third parties; the lamp was defective, and, upon the plaintiff's wife attempting to use it, exploded and injured her. The action was brought by the plaintiff and his wife jointly to recover damages for the injury. There was no proof that the defendant *knew* of the defects in the lamp, and the jury found that he sold the lamp in good faith, without any fraudulent or deceitful representation: it was held that the action was not maintainable, there being no fraud or any misfeasance towards the wife independently of the contract. See also *Gerhard v. Bates*, 2 E. & B. 476.

*Blakemore v.
B. & E. Rail.
Co.*

In *Blakemore v. Bristol & Exeter R. Co.*, 8 E. & B. 1035, a crane had been placed on the company's premises for the purpose of enabling owners of goods to unload them; a consignee of goods, having been required by the company to remove them, proceeded to raise the goods with the crane, assisted by his own and by the company's servants. B., who was the servant of neither, was also asked by the consignee to assist; he did so, and during the operation the crane, which was defective to the company's knowledge, broke, and B. was killed. It was held that the company was not liable to B.'s administratrix, on the ground that the lender of a chattel to be used, (whatever may be his responsibility to the borrower for defects in the chattel, see notes to *Coggs v. Bernard*, vol. i., pp 228—230), is not responsible to a mere stranger who is in no way privy to the contract of loan. The court observed that it had always been considered that *Levy v. Langridge* was a case not to be extended in its application; and that if in that case a friend of the father or sons, by their permission, had used the gun and sustained the accident, no action could have been maintained by him. For a case where the consignee himself was injured while assisting the company's servants, and recovered damages, see *Wright v. L. & N. W. R. Co.*, 1 Q. B. D. 252.

*George v.
Skivington.*

In *George v. Skivington*, L. R. 5 Ex. 1, which was decided upon demurrer, the action was by husband and wife; the declaration stated that the defendant, in the course of his business as chemist, professed to sell a compound made of ingredients known only to himself, which he represented to be fit to be used as a hair-wash without injury to the person using it, and to have been carefully and skilfully compounded by himself: that the defendant sold a bottle to the *husband* to be used by the wife as a hair-wash as the defendant knew,

and upon the terms that it was fit to be used by her without injury, and had been skilfully and carefully compounded: yet the defendant had so negligently conducted himself, that by his negligence the compound could not be used without personal injury: whereby the wife in using it was injured. The defendant objected that, the injury to the wife being the cause of action, the declaration disclosed no facts which cast upon him a legal duty towards her, and attempted to distinguish *Langridge v. Levy*, on the ground that here there was no averment that the defendant knew that the compound was harmful. The court held that the declaration disclosed a good cause of action on the ground that the seller's duty towards the buyer to use ordinary care in compounding the wash extended to the person for whose use the seller knew the compound was bought. Cleasby, B., is reported to have said, "Substitute negligence for fraud and the analogy between *Langridge v. Levy* and this case is complete."

It is a little difficult to extract from the judgments the precise principle upon which this case was decided. It is submitted that it can be supported, if at all, only upon the analogy of those cases, cited by Parke, B., in *Longmeid v. Holliday*, where persons, not parties to contracts, may sue for the damage sustained if they be broken: cases where a wrong has been done to a person for which he would have had a remedy although no such contract had been made, as, for instance, where an apothecary who has supplied improper medicines, or a surgeon who has unskilfully treated a patient, has been held liable to him for misfeasance, although the patient's father, or friend, may have been the contracting party; see *Pippin v. Sheppard*, 11 Price, 400; *Gladwell v. Steggall*, 5 B. N. C. 733; *Foulkes v. M. D. R. Co.*, 5 C. P. D. 157; and compare *Marshall v. York N. & B. R. Co.*, 11 C. B. 655, and *Meux v. G. E. R. Co.*, (1895) 2 Q. B. 387. The *dictum* of Cleasby, B., however applicable to the facts of the case under discussion, must, it is apprehended, be taken as strictly limited to them, since it is impossible to reconcile with *Longmeid v. Holliday* the doctrine that the mere omission to use ordinary care in the manufacture of a chattel can, in the absence of fraud or knowledge of the defect, render the seller liable to third persons not parties to the contract, although he was aware that the chattel was designed for their use; and mere negligence and fraud cannot consistently with those decisions be treated as convertible terms in such cases; and see also *Winterbottom v. Wright*,

George v. Skivington
considered.

supra; *Collis v. Selden*, L. R. 3 C. P. 495; *Le Lievre v. Gould*, cited below, p. 98.

*Heaven v.
Pender.*

The principle involved in these cases was again discussed in *Heaven v. Pender*, 9 Q. B. D. 302, 11 Id. 503. There the plaintiff was injured through the defective condition of the ropes supporting a stage upon which he was standing while painting a ship lying in dock. The stage was supplied by the defendant, the dock owner, under a contract with the shipowner, by whom the plaintiff was employed. There was evidence that the defendant had not taken reasonable care as to the condition of the ropes at the time when he supplied the stage. Judgment having been given for the plaintiff in the county court, Field and Cave, JJ., set it aside, holding that on the facts there was no relation of contract or duty between the plaintiff and the defendant, who had not, as in *Langridge v. Levy*, been guilty of fraud or of a breach of duty to tell the truth, and who did not come under the rule as to persons who invite others to use their property, inasmuch as he had ceased to have any control over the stage after he parted with it to the shipowner. They treated *George v. Skivington* as in point, but as inconsistent with *Winterbottom v. Wright* and *Longmeid v. Holliday*, which they preferred to follow. This decision was reversed on appeal, but with a difference of opinion. Brett, M.R., after an elaborate examination of the authorities, in which he treated *George v. Skivington* as well decided, deduced from them the following proposition, which he laid down as covering and reconciling them all, "that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense, who did think, would at once recognise that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid danger." He was, however, further of opinion that the case fell within the narrower proposition, which affirms the duty of the inviter towards the person invited to take reasonable care. Cotton, L.J., in a judgment in which Bowen, L.J., concurred, declined to adopt the proposition above set out, instancing *Langridge v. Levy*, *Blakemore v. Bristol, &c., R. Co.*, *Collis v. Selden*, and *Longmeid v. Holliday*, as cases in which it was impliedly negatived. He held, however, that when ships were received into dock for repair, and provided with stages for

the work on them which was to be executed there, all those who came to such ships for the purpose of painting or otherwise repairing them were there for business in which the dock owner was interested, and must be considered as invited by the dock owner to use the dock and all appliances provided by him as incident to its use: that he was not responsible for defects arising through the neglect of those who took the control of the stage after he parted with it, but that in this case the defect which caused the accident existed at the time when the stage was provided. (See also *Elliott v. Hall*, 15 Q. B. D. 315.) In dealing with *George v. Skivington*, Cotton, L.J., expressed no disagreement with the court below; but, on the contrary, he said it seemed to support the general proposition which he denied to be law, and that Cleasby, B., had for the purposes of that action treated the defendant's negligence as equivalent to fraud, which he regarded as the ground upon which *Langridge v. Levy* was decided.

Heaven v. Pender.

The general rule that a person who is no party to a contract cannot sue in respect of damage resulting to him from its breach is well illustrated by *Alton v. Mid. R. Co.*, 19 C. B. N. S. 213, where a master sued the company for neglect of duty in carrying his servant, whereby the latter was injured, and the master lost the benefit of his services. On demurrer to the declaration, the court held that, as the injury was alleged to have resulted from a breach of duty arising out of a contract between the servant and the company, the master, being no party to the contract, could not sue in respect of damage caused by its breach; see *Meux v. G. E. R. Co.*, (1895) 2 Q. B. 387. See also *Goslin v. Agricultural Hall Co.*, 1 C. P. D. 482; *Cattle v. Stockton Waterworks*, L. R. 10 Q. B. 453. Where the defendant, a gasfitter employed by the plaintiff's master, left his work in such a condition as to be dangerous to a person approaching it with reasonable caution, the plaintiff, having been injured while so approaching it, was held entitled to recover. In this case there was a duty upon the gasfitter, wholly independent of contract, to take proper precautions to prevent a thing dangerous in itself from causing damage to any person lawfully approaching it; *Parry v. Smith*, 4 C. P. D. 325.

Alton v. Midland Rail. Co.

Stranger to contract cannot sue for damage resulting from breach.

Secus, where damage results from breach of duty, independent of the contract.

The rules deducible from *Langridge v. Levy* as to liability for representations were elaborately discussed by Wood, V.-C., in *Barry v. Croskey*, 2 J. & H. 18, cited with approval by Lord Cairns in *Peek v. Gurney*, L. R. 6 H. L. 412.

Le Lievre v. Gould.

Negligence
not actionable
in the absence
of contract or
of duty
imposed by
law.

In *Le Lievre v. Gould*, (1893) 1 Q. B. 491, a builder obtained loans from the plaintiffs, upon the security of his interest in lands under a building contract between him and the landowner, on the faith of certificates which the defendant gave as to the progress of the work under the contract. The defendant gave the certificates, as surveyor, under a contract, not with the plaintiffs, but with the landowner. The certificates were false owing to the defendant's negligence, but he did not give them fraudulently. By reason of the certificates being false the plaintiffs incurred loss in respect of their loans. The C. A. held that they could not maintain an action against the defendant for his negligence, because he owed no duty to the plaintiffs to exercise care in certifying, his contract not being with them. The court held that, in cases where there is no fraud, *Derry v. Peek* has established the proposition that an action for negligence in making representations does not lie in the absence of contract, and that negligence is not actionable, in the absence of some duty to be careful, created by contract, or by some well established principle of law, such as that which obtains in the case of an invitation, or in the case of parties using highways, and the like cases. The court treated *Heaven v. Pender* as a case of invitation, and held that *Derry v. Peek* had overruled *Cann v. Wilson*, 39 Ch. D. 39, on which the plaintiffs relied. This decision confirms the remarks above made upon *George v. Skivington*, and upon the *dictum* of Cleasby, B., in that case. See *Scholes v. Brook*, 63 L. T. 837 ; *Thiodon v. Tindall*, 60 L. J. Q. B. 526.

BICKERDIKE v. BOLLMAN.

MICH. 27 GEO. 3.—IN THE KING'S BENCH.

[REPORTED 1 T. R. 405 (1 R. R. 242).]

A., a creditor of *B.* to the amount of 115*l.* 3*s.* 8*d.*, took his bill for 20*l.* on *C.*, who had not then, nor afterwards, any effects of *B.* in his hands. The bill when due was dishonoured, and no notice thereof was given by *A.* to *B.*; still *A.*'s demand on the bill was not discharged, but he may sue out a commission of bankrupt against *B.*, and his debt will support it.

CASE for money had and received to and for the use of the bankrupt, before his bankruptcy. 2nd count, On an account stated with the bankrupt. 3rd, For money had and received to and for the use of the plaintiffs as assignees. 4th, An account stated with the assignees. Plea, *non assumpsit*.

This cause was tried at the last assizes for the county palatine of Lancaster, before Buller, J., when the jury found a verdict for the plaintiffs, subject to the opinion of this court, on the following case:

That the act of bankruptcy was committed in the middle of August, 1784. That in the month of August, 1784, the bankrupt was indebted to Greatrix and Co., the petitioning creditors, in 115*l.* 3*s.* 8*d.* That on the 15th of September, 1784, the bankrupt drew a bill for 20*l.* on the defendant (*a*), "who then until the time of the bankruptcy, and of the bill becoming due, was a creditor of the bankrupt," payable to Greatrix and Co. two months after date, and paid the same to them on account of their said debt; which bill was presented for payment on the 18th of November following and dishonoured. That no notice of the non-payment of the bill was ever given by Greatrix and Co. to the bankrupt, or left at his house. That Greatrix and Co. received the bill at Manchester on the 24th of November, between the hours of eleven and twelve at noon; but the post

(*a*) The words between the inverted commas were added by the court, on the argument, with the consent of both parties.

goes from London to Manchester in three days. The bankrupt then resided at Manchester ; but in general secreted himself, and particularly on market days, after the 20th of November, on which day a commission of bankrupt issued against him, and he was declared a bankrupt at Manchester under that commission, in the afternoon of the 24th of November, but at what hour did not appear ; and that commission has since been superseded. Afterwards another commission was issued on the petition of Greatrix and Co.

The question for the opinion of the court is, whether the debt, proved to be due to them under the circumstances above mentioned, is sufficient to support that commission ?

Chambre, for the plaintiff (after observing that the objection which had been raised to the petitioning creditor's debt was, that the bankrupt was to be considered as discharged from the bill for 20*l.* which he had drawn in favour of the petitioning creditor, no notice having been given to the bankrupt of the bills having been dishonoured,) made three questions :

1st. That no notice was necessary to be given to the bankrupt in this case. 2ndly. That even if notice were necessary, it had virtually been given. 3rdly. That it was not competent to the defendant in this action to make the objection.

As to the first, notice must in general be given ; but most of the cases have arisen where the holder has given indulgence to the acceptor, by which he is considered as having made his election to look to the acceptor only for payment. The reason on which the rule, requiring notice to be given to the drawer, is founded is on a supposition that he may have effects in the hands of the drawee, and that he ought to have an opportunity of recovering satisfaction from him ; and a presumption arises that the drawer will suffer from the probable insolvency of the drawee, in consequence of the holder's neglecting to give notice. But in this case that presumption is repelled by stating that the bankrupt was a debtor to the drawee ; therefore the rule does not apply. By an ordinance of France (*b*), the drawer, in order to discharge himself from the payment of a bill on account of his not having had notice of the non-acceptance by the drawee, must show that he had effects in the other's hands at the time

(*b*) Postlethw. tit. Bills of Exchange, 16 and 17 art.

of drawing. The rule requiring notice to be given to the drawer was introduced for his protection, and therefore ought not to be abused so far as to enable him to do injustice.

Secondly. As this case does not fall within the reason on which the rule of law is founded, the bankrupt, not having had effects in the hands of the drawee at the time that the bill was drawn, must be considered as having had virtual notice that the bill was not honoured. Supposing, however, that the rule of law would be inflexible in an action on the bill itself, yet the question here is not altogether whether the drawer can be resorted to on the bill, but whether the circumstances here stated extinguish the preceding debt. But it has been repeatedly held that the mere drawing of a bill of exchange does not extinguish the preceding debt.

Thirdly. The case of *Quantock and Others* against *England* (c) is decisive. On a question whether a debt barred by the Statute of Limitations was sufficient to found a commission of bankrupt upon, Lord Mansfield said: "The Statute of Limitations does not destroy the debt; it only takes away the remedy. Here the debtor himself has not objected; he has submitted to the commission, and been examined under it; therefore the objection does not now lie in the mouth of a third person;" and he said that *Swain* and *Wallinger* (d) was in point. In this case the notice to be given was for the benefit of the bankrupt, and the slightest acknowledgment would be considered as a waiver of it.

BULLER, J. The bankrupt himself could not waive it after the bankruptcy.

Chambre. But the assignees may waive it for the purpose of supporting the commission.

Law, contra. The debt of the petitioning creditor being reduced under 100*l.* by the bankrupt's drawing the bill in question, is as much discharged by the laches of the holder in not giving notice of the non-acceptance of the drawee, as by actual payment. And as to the assignees waiving this objection, it is no answer in the present action. For in all cases where actions are brought by the assignees of a bankrupt, they must make out a clear title, which they cannot do without proving a legal debt of the petitioning creditor; and they

(c) 5 Burr. 2628, 2 W. Bl. 702. (d) 2 Stra. 746.

cannot by their own act make that a good debt which would not be so otherwise.

As to notice not having been necessary because the drawer had no effects in the drawee's hands, that goes to measuring the inconvenience which would result in every particular case from not giving notice. But the court have always said that, whether any actual change of circumstances has or has not taken place, or whether the drawer may or may not have suffered from the negligence of the holder in not having given notice in due time, it is a strict rule of law, introduced for the sake of certainty, and that the drawer may have an opportunity of resorting to the drawee. In the case of *Peach and Burgess* (e), where a question arose upon the necessity of notice being given to the drawer, it was contended that no change of circumstances had taken place, or probable inconvenience had ensued, from want of notice; but Lord Mansfield said, it was a strict rule of law that notice should be given, and it must be adhered to in every case. This case does not come within the rules laid down in the cases of *Tindal* and *Brown* (ee), or *Metcalf* and *Hall* (f), as to what shall be deemed sufficient notice of non-payment or non-acceptance; because here there was no notice at all. It was said by Lee, in arguing the case of *Russel* and *Langstaffe* (g), and not denied by the court, that it had been frequently ruled by Lord Mansfield at Guildhall that it is not an excuse for not demanding payment on a note or bill, or for not giving notice of non-payment, that the maker or acceptor has become a bankrupt, as many ways may remain of obtaining payment by the assistance of friends or otherwise.

The bill's having been given after the act of bankruptcy does not vary the present case; because a debt may be discharged in due course of trade, either by payment of the money after a secret act of bankruptcy, or by payment of the bill, or by dishonouring it.

With regard to the debt's being extinguished by taking this note from the bankrupt; by 3 & 4 Anne, c. 9, s. 7 (h), it is enacted, that "if any person accept a bill of exchange for 20*l.* or

(e) *Sittings at Guildhall, cor. Lord Mansfield.*

(ee) 1 T. R. 167.

f) Tr. 22 G. 3.

(g) 2 Dougl. 514.

(h) Made perpetual, 7 Anne, c. 25, s. 3; repealed, 45 & 46 Vict. c. 61.

upwards, in satisfaction of any former debt, the same shall be accounted a full and complete payment of such debt, if such person accepting of any such bill for his debt doth not take his due course to obtain payment thereof by endeavouring to get the same accepted and paid, and make his protest as aforesaid, either for non-acceptance or non-payment thereof." Here there was neither protest nor notice, and therefore the bill must be considered as a complete payment.

Chambre, in reply, was stopped by the court.

ASHHURST, J. As to the general rule, it has never been disputed that the want of notice to the drawer, after the dishonour of a bill, is tantamount to payment by him. But that rule is not without exceptions; and particularly in the case mentioned by the plaintiff's counsel, that notice is not necessary to be given where the drawer has no effects in the hand of the drawee (*i*); for it is a fraud in itself, and if that can be proved, the notice may be dispensed with. In this case it appears that, at the time of drawing the bill, the drawer, so far from having any effects in the hands of the drawee, was actually indebted to him to a large amount.

But even admitting this to be a general rule without any exception, it was certainly introduced for the benefit of the drawer. Now, every rule may be waived by the person for whose benefit it is introduced. Under the circumstances of the present case, the drawer must be considered as having waived this benefit, because the commission is founded on that creditor's debt, between whom and the drawer this transaction has happened; and his submitting to it is a waiver of the want of notice, and an admission of the debt; which admission the assignees have subsequently confirmed by bringing this action. Therefore I think that as the bankrupt himself has not chosen to take advantage of it by moving to supersede the commission, it does not now lie in the mouth of a third person to do so.

BULLER, J. The last point may be laid entirely out of the case, because, unless the objection be well founded in the case of the bankrupt himself, it is immaterial to consider how far it was competent for a third person to take advantage of it. The case of *Quantock* and *England* does not apply. There the

(*i*) See *Gale v. Walsh*, 5 T. R. 239.

(BULLER, J.)

question was, whether a third person should be permitted to avail himself of the Statute of Limitations. There might be good reasons for disallowing it in that case, because the debt still remained in conscience. But here the question is, whether there was a sufficient debt to support the commission at the time when it issued.

The first point to be considered is, whether, under these circumstances, it was necessary to give notice within as short a time as could conveniently be done that the bill was neither accepted nor paid. I am of opinion that no such notice was necessary. On the second trial of the cause of *Tindal* and *Brown* before me at Guildhall, the jury told me they found their verdict for the plaintiff on the ground that it had not appeared from the evidence that any injury had arisen to the party from want of notice. In consequence of which, upon the subsequent trial, I told the jury that where a bill was accepted, it was *primâ facie* evidence that there were effects of the drawer in the hands of the acceptor. The mistake of the jury on the former occasion had arisen from their taking it for granted that the drawer had not been injured by the want of notice, because he had not proved it, whereas that proof lay on the plaintiff to produce. And upon my mentioning this matter to this court, they thought that if there were no effects in the hands of the acceptor, that would vary the question very much, as the drawer could not be hurt.

The law requires notice to be given, for this reason, because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands ; and if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he has no effects in the other's hands, then he cannot be injured for want of notice (k). Soon after I sat on this bench, I tried a cause at Guildhall, on a bill of exchange which was either drawn or accepted by a person residing in Holland, and a full special jury, under my direction, found a verdict for the plaintiff, notwithstanding no notice had been given to the drawer of the bill's having been dishonoured, because he had no effects in the hands of the person on whom the bill was drawn. The verdict never was objected to ; and if it be proved on the

(k) See *Fitzgerald v. Williams*, 6 B. N. C. 69.

part of the plaintiff that, from the time the bill was drawn till the time it became due, the drawer [drawee] never had any effects of the drawee [drawer] in his hands, I think notice to the drawer is not necessary; for he must know whether he had effects in the hands of the drawee or not; and, if he had none, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonoured. On these grounds I think the petitioning creditor's debt was sufficient to support the commission.

Besides, in the present case, as the plaintiff's counsel have truly argued, the question is not, whether an action could be maintained on the bill itself, but whether the want of notice extinguishes the debt. As to which the case is this. *A.* not having any effects in *C.*'s hands, draws a bill of exchange for 100*l.* on him, in favour of *B.*, for value received. Now, if *C.* does not accept, and *B.* does not give notice to *A.*, there is an end of the bill. Then how does the case stand? *A.* has 100*l.* of *B.*'s in his hands, without any consideration, which therefore *B.* may undoubtedly recover in an action for money had and received.

Per Curiam. Let the *Postea* be delivered to the plaintiffs.

THOUGH the law as to notice of dishonour is now codified by the Bills of Exchange Act, 1882 (see *post*, p. 111), nevertheless, as there have been few cases decided upon its construction, it has been thought desirable to retain the above case, and the following note, which deal with the state of the law at the time when it came into operation.

In *Goodall v. Dolley*, 1 T. R. 712, where the action was brought against the payee, Buller, J., intimated that, had the action been against the drawer, the case would have been governed by *Bickerdike v. Bollman*; and in *Rogers v. Stephens*, 2 T. R. 713, the decision was partly founded on *Bickerdike v. Bollman*, which Grose, J., said had been well considered. In *Legge v. Thorpe*, 12 East, 171, an action was brought by the indorsee against the drawer of a foreign bill drawn on one Wyatt; the declaration negatived effects in the hands of the drawee or any consideration for the bill.

Where drawer of bill had no effects in hands of drawee, he was not entitled to notice of dishonour.

It appeared at the trial that the defendant had no effects in Wyatt's hands, and that the latter had therefore refused to accept, but that Wyatt was one of the executors of a person called Weeks, and that Weeks's executors had desired the defendant to employ the payee of this bill to do some work on Weeks's property; and the defendant therefore drew this bill on Wyatt to settle with the payee. Wyatt denied that he had assets to pay the bill. The only question was, whether a protest of non-acceptance was necessary; Lord Ellenborough thought not, and the plaintiff had a verdict; and on a motion for a new trial, the whole court thought the case governed by *Bickerdike v. Bollman*, and discharged the rule.

Claridge v. Dalton, 4 M. & S. 226, is another strong exemplification of this doctrine. There the drawer of a bill had no effects in the hands of the drawee, but had supplied him with goods upon a credit, which would not, however, expire till long after the bill would become due. He was held not to be entitled to notice of its dishonour. "The case of *Bickerdike v. Bollman*," said Bayley, J., "has established, and, I am disposed to think, rightly, that a party who cannot be prejudiced by want of notice, shall not be entitled to require it."

Analogous
rule as to
presentment.

In analogy to the rule which dispensed with *notice* in such cases as the above, it was held that it is unnecessary as against the drawer to *present* such a bill on the day of its becoming due; *Terry v. Parker*, 6 A. & E. 502; *Wirth v. Austin*, L. R. 10 C. P. 689.

Rule of princi-
pal case not to
be extended.

But even in the very cases in which *Bickerdike v. Bollman* has been acted upon, it has been declared that the rule established in that case must not be extended. In *Claridge v. Dalton*, *supra*, Le Blanc, J., went so far as to regret that any such decision had ever taken place; see also *per Parke, B.*, in *Carter v. Flower*, 16 M. & W. 743; *per Lord Campbell*, in *Everard v. Watson*, 1 E. & B. 804; *per Brett, L.J.*, in *Turner v. Samson*, 2 Q. B. D. 23.

Where drawer
had effects on
way to drawee.

Accordingly it was settled that the drawer is entitled to notice, though he had no effects in the drawee's hands when the bill was drawn or became due, if he had effects on their way to the drawee; *Rucker v. Hiller*, 16 East, 43. So it was laid down by Lord Eldon, in a case of bankruptcy, that, "if bills were accepted *for the accommodation of the drawer*, and there was nothing but that between them, notice was not necessary, the drawer being, as between

him and the acceptor, first liable: but if bills were drawn *for the accommodation of the acceptor*, the transaction being for his benefit, there must be notice without effects; and if, in the result of various dealings, the surplus of accommodation is on the side of the acceptor, he is, with regard to the drawer, exactly in the situation of an acceptor having effects, and the failure to give notice may be equally detrimental;” *Ex p. Heath*, 2 V. & B. 240.

Where bill for accommodation of acceptor.

And this rule, thus laid down by Lord Eldon, extended to cases where the drawer had reason to expect that some third party would provide for the payment of the bill; thus in *Cory v. Scott*, 3 B. & Ald. 619, where the bill was drawn and accepted for the accommodation of the first indorsee, the drawer was held to be entitled to notice; and the same point was decided in *Norton v. Pickering*, 8 B. & C. 610. And the same rule prevailed though the person expected to provide funds was not a party to the bill; *Lafitte v. Slatter*, 6 Bing. 623.

Where drawer had reason to expect that third party would provide for bill.

If the drawer had funds in the drawee's hands sufficient to meet the bill, even in part, though not wholly, he was entitled to notice; *Thackray v. Blackett*, 3 Camp. 164; but see *Carew v. Duckworth*, L. R. 4 Ex. 313. If the drawer had made a provision to have funds in the drawee's hands to meet the bill, he had a right to notice, though the funds might not have actually arrived there; *Robins v. Gibson*, 3 Camp. 334. And if the drawer had effects at the time when the bill was drawn, he did not lose his right to notice, although before the time of payment he might have ceased to have any; *Orr v. Maginnis*, 7 East, 359; or was indebted to the drawee in a larger sum; *Blackhan v. Doren*, 2 Camp. 503.

Other cases.

These are strong cases, especially *Orr v. Maginnis*, for there the drawer could, at the time when it fell due, have had no reasonable expectation that the bill would be paid, and could have sustained no prejudice from the want of notice; so that that case may be considered as going the length of deciding that if, at any time after the bill was issued, the drawer could have reasonably expected that it would be paid, he had a right to notice. Thus in *Hammond v. Dufrene*, 3 Camp. 145, it was held unnecessary that the effects should be in the drawee's hands when the bill was drawn, if they were there before it became due; and see *Carew v. Duckworth*, L. R. 4 Ex. 313.

Although it was said by Bayley, J., in *Claridge v. Dalton*,

Dictum, that party not entitled to notice who cannot be prejudiced by want of it, qualified.

Cresswell, J.

as above stated, "that a party who cannot be prejudiced by want of notice, shall not be entitled to require it," still the application of this *dictum* must be confined to the particular description of case then before the court; for we have seen that it does not extend to such a case as *Orr v. Maginnis*. So, too, it is difficult to conceive how the drawer could be prejudiced by want of notice, where the drawee had become bankrupt or notoriously insolvent. Yet in both those cases he was unquestionably entitled to it; see *Russel v. Langstaffe*, 2 Dougl. 514, referred to in the text; *Esdaile v. Sowerby*, 11 East, 114; and in *Dennis v. Morrice*, 3 Esp. 158, Lord Kenyon refused evidence tendered for the purpose of showing that the drawer was not prejudiced by want of notice. In fact, to use the words of Tindal, C.J., and Bosanquet, J., in *Lafitte v. Slatter*, 6 Bing. 627, "*Bickerdike v. Bollman* is an excepted case, the principle of which is not to be extended." In *Caunt v. Thompson*, 7 C. B. 409, it was said by Cresswell, J., delivering the judgment of the court, "It may be assumed to be a settled rule that knowledge of the probability, however strong, that a bill of exchange will be dishonoured, cannot operate as a notice of dishonour, or dispense with it, . . . so also it may be considered as settled that information that a bill has been dishonoured, derived from a person not having authority to give it, does not supply the place of notice. Hence it has become usual to say that *knowledge* of the dishonour of a bill is not equivalent to *notice*." It appears, however, from the case last cited, that where the drawer was himself the party to pay the bill (for instance, where he was the executor of the acceptor) his knowledge that the bill had been presented to him, and was unpaid, was equivalent to notice.

In *Re Leeds Banking Co.*, 1 Eq. 1, it was held that an indorsement, payable "in need" at a particular bank, did not render the bank notified the agents of the indorsers to receive notice of dishonour, and that therefore, although the drawer and acceptor had become bankrupt before the bill became due, notice to the bank was not notice to the indorsers, nor could presentment for payment, even to the indorser himself, operate *per se* as notice of dishonour by the acceptor.

Pleading.

It seems, however, from the expressions of the court in *Fitzgerald v. Williams*, 6 B. N. C. 68, that, in pleading, the want of notice was *primâ facie* sufficiently excused by showing

that there were no funds in the drawee's hands; and it was there decided that where the declaration averred that there were no funds in the drawee's hands, nor any consideration for the acceptance, and that the defendant sustained no damage from the want of notice, it lay upon the defendant to prove the damage, if any resulted.

But the circumstances which would amount to a sufficient excuse for want of notice as against the *drawer* did not always excuse want of notice to an *indorser*. Where an action was brought by the indorsee of a promissory note against the indorser, to whom it had been indorsed by the payee, the declaration alleged, that neither at the time the note was made, nor afterwards and before it became due, nor when it became due and on presentment for payment, had the maker or payee any effects of the defendant in his hands, nor was there any consideration or value for the making of the note, of the payment thereof, or its indorsement by the payee to the defendant, and that the defendant had not sustained any damage by reason of his not having had notice of the non-payment of the note; it was held that, as against an *indorser*, the declaration did not state a sufficient excuse of want of notice of dishonour, as it was consistent with the averments in the declaration that the note might have been indorsed by the defendant for the accommodation of a prior party, in which case the defendant would be entitled to notice of dishonour; *Carter v. Flower*, 16 M. & W. 743. Accordingly in *Turner v. Sampson*, 2 Q. B. D. 23, where, as between all the parties to an accommodation bill, the intention was that the last indorser should pay it, it was held, in an action against a prior indorsee, that he was entitled to notice of dishonour; and see *Foster v. Parker* 2 C. P. D. 18. "If no notice has been given *at any time*, the excuse ought to be set out on the record; if it has been given, but at a time which would be too late in the usual course, the matter of excuse might probably be used to show that it was, under the circumstances, *in reasonable time*;" *Carter v. Flower, supra*. Where the indorser was held not to be entitled to notice, see *Corney v. Mendez da Costa*, 1 Esp. 302; and, as to what excuses were sufficient in the analogous case of presentment for payment, see *Sands v. Clarke*, 8 C. B. 751; *Bank of Van Diemen's Land v. Bank of Victoria*, L. R. 3 P. C. 526; *Chartered Bank v. Dickson*, Id. 574; *Re Boyse*, 33 Ch. D. 612; and s. 46 of the Act of 1882, *post*, p. 112.

Excuse for
want of notice
sufficient
against drawer
not sufficient
against
indorser.

Presentment
for payment.

Form of
notice.

In the earlier cases, notices of dishonour were strictly construed by the courts, and were often held to be insufficient upon very technical grounds. The disposition of the courts, in the later decisions, was to construe these notices more liberally; and before the Bills of Exchange Act, 1882, it had been established that, although the notice must intimate that the bill had been presented and dishonoured, it was not necessary that the person to whom it was addressed should be informed, in terms, that the holder looked to him for payment; see *Furze v. Sharwood*, 2 Q. B. 388; *Shelton v. Braithwaite*, 7 M. & W. 436; *Miers v. Brown*, 11 Id. 372; *Rowlands v. Springett*, 14 Id. 7; *Chard v. Fox*, 14 Q. B. 200; *Mellersh v. Rippen*, 7 Exch. 578; *Metcalf v. Richardson*, 11 C. B. 1011; *Paul v. Joel*, 4 H. & N. 355; *Viale v. Michael*, 30 L. T. 463; *Ex p. Lowenthal*, 9 Ch. 591. As to what was reasonable diligence in giving notice of dishonour, see *Gladwell v. Turner*, L. R. 5 Ex. 59; *Re Leeds Bank*, 1 Eq. 1; *Berridge v. Fitzgerald*, L. R. 4 Q. B. 639; *Prideaux v. Criddle*, Id. 455; *Heywood v. Pickering*, 9 Id. 428; notice of dishonour to the drawer himself might be sufficient notwithstanding that he had been bankrupt and a trustee had been appointed; *Ex p. Baker*, 4 Ch. D. 795.

Reasonable
diligence.

To bankrupt
drawer.

Waiver.

A subsequent promise to pay, made by an indorser of a bill who has had no notice of dishonour, was evidence of a waiver of the right to notice; see *Woods v. Dean*, 3 B. & S. 101; *Cordery v. Colville*, 32 L. J. C. P. 210.

English
drawer of
bill on
foreigner
entitled only
to notice
prescribed by
foreign law.

It may here be noticed that by some foreign laws notice of dishonour is given through an official channel, and so that the receipt of it by an indorser residing out of the country may be matter of courtesy or chance. It was held that the drawer or indorser in England of a bill directed to a person residing in such foreign country is only entitled to the notice which its law prescribes; a proposition which, though, perhaps, not sustainable upon the grounds on which it was rested in *Rothschild v. Currie*, 1 Q. B. 43, will be found, it is submitted, upon examination, to have reason as well as convenience in its favour (see *Hirschfield v. Smith*, L. R. 1 C. P. 340). It was afterwards approved and adopted in the C. A. in *Horne v. Rouquette*, 3 Q. B. D. 514, where, though the court questioned the reasoning of *Rothschild v. Currie*, they adopted the decision. *Horne v. Rouquette*, indeed, went one step further, for the court unanimously regarded as immaterial the fact that the bill there sued on was a foreign bill, and held that the rights of

an indorser in England to notice of dishonour might be modified by the fact that the bill had been subsequently indorsed in a country where notice of dishonour was not necessary. In that case the plaintiff had indorsed the bill in Spain, where it seems that notice of dishonour by non-acceptance is not necessary, and had himself consequently become liable upon it although he did not receive notice until long after the bill had been dishonoured.

On receiving notice of dishonour he, however, immediately passed it on to the defendant from whom he had taken the bill by endorsement in England. It was held that the defendant was liable. Cotton, L.J., indeed pointed out that the case did not decide that the plaintiff who took by indorsement in England could have recovered against the defendant had he delayed in passing on the notice of dishonour. It is submitted, however, that, as in *Hirschfield v. Smith*, so in the case supposed, the real question would be, what was reasonable notice to give under the circumstances, and as any notice would have been practically nugatory after the delay which had already taken place, a plaintiff's right could hardly be defeated by *any* additional delay beyond that which is under ordinary circumstances permissible by English law. See further *Rouquette v. Overmann*, L. R. 10 Q. B. 525, and the notes to *Mostyn v. Fabrigas*, *ante*, vol. i. The same principle explains what at first sight appears anomalous, viz., that a person having certain rights under a contract made in this country should find those rights modified by matter subsequent which has taken place in a foreign country. For since the right of an indorser in England is to receive reasonable notice of dishonour, and since any person who indorses a negotiable instrument must be taken to know that it may circulate outside this country, reasonable notice may well be held to be such notice as, having regard to the various places where the bill has circulated, it has been possible for the party suing to give. See also *per* Wills, J., *Lee v. Abdy*, 17 Q. B. D. 314.

The sections of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), which deal with the subject of this note are as follows:—

Bills of Exchange Act
1882.

S. 97. (1.) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto, notwithstanding anything in this Act contained. (2.) The rules of common law, including the law merchant, save in so far as they are inconsistent with the

S. 97.

express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.

S. 46.

Excuses for delay or non-presentment for payment.

S. 46. (1.) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. (2.) Presentment for payment is dispensed with—

(a) Where, after the exercise of reasonable diligence, presentment, as required by the Act, cannot be effected. The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

(b) Where the drawee is a fictitious person.

(c) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented. See *Re Boyse*, 33 Ch. D. 612.

(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

(e) By waiver of presentment, express or implied.

S. 47, sub-s. 2.

S. 47. (2.) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawers and indorsers accrues to the holder.

S. 48.

Notice of dishonour and effect of non-notice.

S. 48. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; Provided that (1) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission. (2) Where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment, unless the bill shall in the meantime have been accepted.

S. 49.

Rules as to notice of dishonour.

S. 49. Notice of dishonour, in order to be valid and effectual, must be given in accordance with the following rules :—

1. The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.
2. Notice of dishonour may be given by an agent, either in his own name, or in the name of any party entitled to give notice, whether that party be his principal or not.
3. Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.
4. Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.
5. The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment.
6. The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.
7. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice, unless the party to whom the notice is given is in fact misled thereby.
8. Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.
9. Where the drawer or indorser is dead and the party giving notice knows it, the notice must be given to a personal representative, if such there be and with the exercise of reasonable diligence he can be found.
10. Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.
11. Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

12. The notice may be given as soon as the bill is dishonoured (see *Kennedy v. Thomas*, (1894) 2 Q. B. 759), and must be given within a reasonable time thereafter. In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless:—

(a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

13. Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

14. Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

15. Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.

S. 50.
Excuses for
non-notice
and delay.

S. 50. (1.) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

2. Notice of dishonour is dispensed with—

(a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to

or does not reach the drawer or indorser sought to be charged :

(Notice *must* be given if, at *any* time before action, the holder can find the drawer or indorser, though he could not find him at the time of dishonour ; *Studdy v. Beesty*, 60 L. T. 647.)

(b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice :

(c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person, or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment :

(d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person, or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

S. 72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights and duties, and liabilities of the parties thereto are determined as follows :—

S. 72.
Conflict of
laws.

3. The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done, or the bill is dishonoured.

DOE *d.* RIGGE *v.* BELL.

MICH.—34 GEO. 3.

[REPORTED 5 T. R. 471 (2 R. R. 642).]

If a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day, and quit at Candlemas, though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore the landlord can only put an end to the tenancy at Candlemas.

THIS ejectment was on the demise of T. Rigge, guardian of H. and M. Rigge, infants. At the trial at the last assizes at York, before the Lord Chief Baron, it appeared that in January, 1790, Wilkinson, as agent for the lessor of the plaintiff, let the farm in question, called Hague's Farm, to the defendant for seven years, by parol. The defendant was to enter when the former tenant quitted, namely, on the land at old Lady-day, and the house on the 25th of May following; and he was to quit at Candlemas. The defendant entered accordingly, and paid rent. A notice to quit at Lady-day last was served on the 22nd of September, 1792. It was also proved that both the daughters of the lessor of the plaintiff were above fourteen.

The defendant's counsel objected, first, That the notice to quit was insufficient; the holding being from Candlemas, and the notice requiring the defendant to quit at Lady-day; 2ndly, That the lessor of the plaintiff claimed as guardian in socage to his daughters, who were both above the age of fourteen. And the plaintiff was nonsuited.

Chambre, on a former day, obtained a rule, calling on the defendant to show cause why this nonsuit should not be set aside. As to the first objection, he said, this was a holding from Lady-day, and that, therefore, the notice to quit was regular; and, as to the second, he produced an affidavit, in which it was stated that one of the daughters of the lessor of the plaintiff was under fourteen years of age.

Cockell, Serjeant, and *Walton*, were now to have shown cause against the rule; but

Law, *Chambre*, and *Barrow* were desired to answer the first objection; as to which they argued that, as that agreement for seven years was void by the Statute of Frauds, it being by parol, the defendant must be considered as tenant from year to year, that year commencing at Lady-day, when he entered; and that consequently the notice to quit at Lady-day, served more than half a year before, was regular.

LORD KENYON, C.J.—Though the agreement be void by the Statute of Frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of the year when the tenant is to quit, &c. So where a tenant holds over after the expiration of his term without having entered into any new contract, he holds upon the former terms. Now in this case it was agreed that the defendant should quit at Candlemas; and though the agreement is void as to the number of years for which the defendant was to hold, if the lessor choose to determine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas.

Rule discharged.

THIS and the succeeding case, with the notes thereto, are still retained (notwithstanding the case of *Walsh v. Lonsdale*, *infra*, and the other cases which have followed that decision), because they deal with the law, as recognised both at law and in equity, prior to the Judicature Acts, and with the position of a tenant holding over after the expiration of a term, which is not affected by the above decisions.

At common law, if a party occupied and paid rent under an agreement for a term, then, although such agreement might not operate to create the proposed term, in consequence either of its not amounting to a lease, as in *Richardson v. Gifford*, 1 A. & E. 52, or of its not being a good execution of a power, as in *Beale v. Sanders*, 3 B. N. C. 850, yet the party so occupying and paying rent was considered as holding as yearly tenant upon all the terms of the agreement not inconsistent with a yearly tenancy, such as the obligation to repair, and the like. As to

Occupation by tenant under invalid lease before Judicature Act.

Bound by all terms not inconsistent with tenancy from year to year.

Covenant not
to take suc-
cessive crops
of corn.

To repair.

To pay rent
in advance.

Case of
corporation.

Such tenancy
is determined
at end of term
without
notice.

covenants to repair, see *Richardson v. Gifford*, and *Beale v. Sanders*, *supra*. So in *Doe v. Amey*, 12 A. & E. 476, where a party entered, and paid rent under an agreement for a future lease for years, which was to contain a covenant not to take successive crops of corn, with a condition of re-entry for breach of covenant, it was held that ejectment might be brought upon successive crops of corn being taken by the tenant; see also *Doe v. Breach*, 6 Esp. 106. In *Pistor v. Cater*, 9 M. & W. 315, a tenant entered upon a copyhold under an agreement for a lease “*as soon as the lord’s licence could be obtained*,” in which he was to covenant to repair; no licence was obtained, or lease made; yet he was held bound to repair. This seems a strong case; see also *Bennett v. Ireland*, E. B. & E. 326. In *Martin v. Smith*, L. R. 9 Ex. 50, it was held that an agreement to do special repairs in the last year of a term of seven years, contained in an agreement void as a lease, was binding on the tenant if he remained tenant so long; see *Adams v. Clutterbuck*, 10 Q. B. D. 403.

A stipulation to pay rent in advance is consistent with a yearly tenancy, and is binding on a tenant who enters under a void lease, or holds over; *Lee v. Smith*, 9 Exch. 662; *Dougal v. McCarthy*, (1893) 1 Q. B. 736; so also is a proviso for re-entry on non-payment of rent; *Thomas v. Packer*, 1 H. & N. 669. As to cases where *corporations* are either the landlords or the tenants, see *Doe v. Tanriere*, 12 Q. B. 998; *Finlay v. Bristol and Exeter R. Co.*, 21 L. J. Ex. 117; *Eccles. Commissioners v. Merral*, L. R. 4 Ex. 162.

There is this peculiarity in the tenancy created by payment of rent after entry under an agreement for a lease, or a void lease, that although it is considered a tenancy from year to year during the continuance of the term proposed to be granted by the lease, and can only be put an end to after the usual notice; *Chapman v. Towner*, 6 M. & W. 100; yet it is determined at the expiration of that term, without any notice to quit; *Doe v. Stratton*, 4 Bing. 446; *Berrey v. Lindley*, 3 M. & Gr. 498, 511; *Tress v. Savage*, 4 E. & B. 36; and this is so though the agreement under which the tenant entered provided for the extension of the term specified therein upon certain conditions; *Doe v. Moffatt*, 15 Q. B. 257.

Such is the common law. But we must now consider the effect of the Judicature Acts upon this subject. In *Walsh*

v. Lonsdale, 21 Ch. D. 9, it was laid down by Jessel, M.R., that since those Acts a person occupying under an executory agreement, of which specific performance would be enforced, is not merely tenant from year to year, but holds upon the same terms as if a valid lease had been granted. In that case the plaintiff agreed to take a lease from the defendant of a mill for seven years at a rent of 30s. a year for each loom run, and to run not less than 540 looms. The lease was to contain the same stipulations as were inserted in a specified lease, one of which was that, except in the last year of the term, one year's rent of the premises should always be payable in advance on demand, in addition to the proportion, if any, of the yearly rent due and unpaid for the period previous to such demand. The plaintiff was let into possession, and paid rent quarterly, but not in advance, for a year and a half. The defendant then demanded a year's rent in advance, and a proportion of the rent for the previous period, and, upon refusal to pay, distrained. In an action in the Chancery Division for damages for illegal distress, an injunction, and specific performance, the plaintiff applied for an *interim* injunction. One of the grounds of the application was that since the rent payable depended upon the number of looms run, there could be no fixed sum payable in advance as rent, but assuming the rent to be ascertained, it was further argued that the plaintiff was only tenant from year to year on such of the terms of the agreement as were not inconsistent with such a holding, and that the clause making a year's rent always due in advance was obviously inconsistent with a tenancy which might be determined by a half-year's notice. Fry, J., granted the injunction, but only on the terms of paying the whole amount of rent claimed into court. This decision was affirmed on appeal, subject to an immaterial variation. The court did not, upon an interlocutory proceeding, finally determine the questions in the action, but expressed a decided opinion that the rights of the parties must be ascertained by reference to the lease as it ought to be framed pursuant to the contract between the parties. In this view there was nothing to prevent the lessor from exercising then the same right of distress which he would have acquired had the lease been executed. It is to be observed that the person complaining of the distress was himself at the same time claiming specific performance of the lease, and could not therefore, in a court of equity, be

Walsh v.
Lonsdale.

Occupant
under execu-
tory agree-
ment now to
be treated in
every court as
bound by all
terms of the
agreement.

Effect of
Judicature
Act.

Walsh v.
Lonsdale.

heard to complain of one of the provisions in an agreement which he was himself setting up; and this appears to be the ground of the decision.

Jessel, M.R., said: "There is an agreement for a lease under which possession has been given. Now, since the Judicature Act, the possession is held under the agreement. There are not two estates, as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, *it being a case in which both parties admit that relief is capable of being given by specific performance.* That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted."

Lowther v.
Heaver.

In *Lowther v. Heaver*, 41 Ch. D. 248, the rule laid down by Jessel, M.R., was approved by Cotton, L.J., who said: "I am of opinion that the late Master of the Rolls was correct in saying, as he did in *Walsh v. Lonsdale*, that a tenant holding under an agreement for a lease of which specific performance would be decreed stands now in the same position as if the lease had been granted. He is entitled only in equity, it is true, to a lease, but being entitled in equity to have a lease granted, his rights ought, in my opinion, to be dealt with in the same way as if a lease had been granted to him, and do not depend upon its actually having been granted."

Swain v.
Ayres.

In *Swain v. Ayres*, 21 Q. B. D. 289, Lord Esher stated the rule thus: "I should be disposed to say that, when there is such a state of things that a court of equity would compel specific performance of an agreement for a lease by the execution of a lease, in both the Equity and Common Law Divisions the case ought to be treated as if such a lease had been granted and was actually in existence. That is a very different thing from saying that, where equity would not compel specific performance by the execution of a lease, the lease of which equity would not decree execution is to be considered in equity as existing." See *Strong v. Stringer*, 61 L. T. 470.

Coatsworth v.
Johnson.

In *Coatsworth v. Johnson*, 55 L. J. Q. B. 220, and in *Swain v. Ayres*, the landlord was insisting on a forfeiture, and the tenant claimed the protection of s. 14 of the Conveyancing Act, 1881. The tenant in each case was holding

under an agreement void as a lease, and the C. A. held that he was not protected by s. 14, the forfeiture being proved. See *Dumpor's Case*, vol. i., p. 50.

The rule, above discussed, can only be applied in a court which has jurisdiction to decree specific performance, and therefore cannot be applied in a county court when the value of the premises exceeds the limit of the equitable jurisdiction of county courts to grant specific performance; *Foster v. Reeves*, (1892) 2 Q. B. 255.

From the above cases it now appears that the rule, in all courts possessing sufficient equitable jurisdiction, is that when a tenant has entered under an agreement, which is void as a lease, the matter is to be dealt with as if the lease had been actually granted, if either party elects to insist on that equity and shows that he is entitled to specific performance.

The liability of a party holding over after the expiration of a tenancy by agreement, is rather a matter of evidence than of law; and although Lord Kenyon in the principal case, and Lord Ellenborough in *Digby v. Atkinson*, 4 Camp. 275, seem to lay down the rule as one of law, yet in all the more recent cases upon the subject, the existence of any tenancy in the party holding over (beyond a tenancy at sufferance, which exists, by law, in every case where a person holds over by wrong after the determination of a rightful estate, but which imports no privity between the landlord and tenant, Co. Litt. 57b, 270b, 271a), as well as the terms upon which such tenancy exists, have been considered as questions for the jury: the construction of any written agreement, and the applicability of its terms to a tenancy from year to year, being for the decision of the court. See the remarks of Lord Denman and Littleton, J., in *Johnson v. St. Peter's, Hereford*, 4 A. & E. 525; *Jones v. Shears*, Id. 832; *Elgar v. Watson*, Car. & M. 494; and *Thetford v. Tyler*, 8 Q. B. 95, in which case Wightman, J., said: "When a party is allowed to hold over after the expiration of a tenancy by agreement, the terms on which he continues to occupy are matter of evidence rather than of law." See also *Walker v. Gode*, 6 H. & N. 594; *Oakley v. Monck*, 3 H. & C. 706, L. R. 1 Ex. 159; *L. & N. W. R. Co. v. West*, L. R. 2 C. P. 553; and *Cornish v. Stubbs*, 5 Id. 334. The law, it is apprehended, does not infer any particular contract from the mere fact of entry under an agreement for a future lease, or a holding over after the

Foster v.
Reeves.

Result of
above cases.

Terms upon
which party
holds over
after expira-
tion of
tenancy a
question of
fact.

expiration of a past agreement; *Waring v. King*, 8 M. & W. 571, 575, *per* Lord Abinger; see *Jenner v. Clegg*, 1 M. & Rob. 217; *Jones v. Shears*, *supra*; *Chapman v. Towner*, 6 M. & W. 104, *per* Parke, B.; *Riseley v. Ryle*, 11 Id. 16; *Thetford v. Tyler*, *supra*.

Consent
necessary to
create new
tenancy.

In *Right v. Darby*, 1 T. R. 159, Lord Mansfield said that "if there be a lease for a year, and by *consent* of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract." This rule was adopted by the C. A. in *Dougal v. McCarthy*, (1893) 1 Q. B. 736, where it was held that it is a question of fact in such a case whether there was the consent of both parties that the tenant should remain in possession after the termination of the tenancy, and that if by such consent the tenant remained in possession as tenant, the implication is that he is yearly tenant on the old terms, so far as they are consistent with such a tenancy, unless something was said or done which was inconsistent with such an implication.

Presumption
where rent
paid on terms
of agreement.

Where the party so occupying pays rent according to the terms of the agreement, either past or future, and thereby becomes tenant from year to year, the inference is irresistible, *in the absence of anything to show a different understanding*, that the parties intend the occupation to continue upon such of the terms of the agreement as are not inconsistent with such tenancy; and this is probably all that was intended by Lord Kenyon in the principal case, and by Lord Ellenborough in *Digby v. Atkinson*. See *Doe v. Geekie*, 5 Q. B. 841; *Finch v. Miller*, 5 C. B. 428; *Kelly v. Patterson*, L. R. 9 C. P. 681; *Hyatt v. Griffiths*, 17 Q. B. 508; and the note to the next case.

Where rent
received in
ignorance of
terms of
letting.

It is obvious that the ordinary inference from a holding over and payment of rent may be rebutted by showing that the person who is the *owner of the land when the lease expires*, and who receives the rent, is not acquainted with the terms of the original letting. Thus, where a remainderman allowed a tenant, let in by the previous tenant for life, to remain in possession after the death of the tenant for life, and consequent expiration of the lease, and received from him the old rent, but did not know that the lease had provided that at the end of the tenancy the lessee was to be paid for all fruit trees planted by him, it was held that this stipulation did not form one of the terms of the new tenancy; *Oakley v. Monck*, L. R. 1 Ex. 159; see *Wyatt v. Cole*, 36 L. T. 613.

The rules mentioned above apply where there has been a real holding over. The mere accidental retention by a yearly tenant of the key of the premises after giving notice to quit, and removing with his goods from the house, is not evidence of an intention to continue the tenancy; *Gray v. Bompas*, 11 C. B. N. S. 520.

Accidental detention of key after notice and removal by tenant.

CLAYTON v. BLAKEY.

MICH.—39 G. 3.

[REPORTED 8 T. R. 3 (4 R. R. 575).]

Though by the Statute of Frauds it is enacted that all leases by parol, for more than three years, shall have the effect of estates at will only, such lease may be made to enure as a tenancy from year to year.

THIS was an action against a tenant for double rent for holding over after the expiration of his term, and a regular notice to quit. The first count of the declaration stated a holding under a certain term, determinable on the 12th of May then past; and other counts stated a holding from year to year, determinable at the same period. It appeared in evidence that the defendant had held the premises for two or three years, under a parol demise for twenty-one years from the day mentioned, to which the notice to quit referred; and the Statute of Frauds directing that any lease for more than three years, not reduced into writing, shall operate only as a tenancy at will, it was contended, at the trial, at the last assizes for Northumberland, that the holding should have been stated according to the legal operation of it, as a tenancy at will; and, as there was no count adapted to that statement, that the plaintiff ought to be nonsuited. Rooke, J., however, considering that it amounted to a tenancy from year to year, overruled the objection, and the plaintiff obtained a verdict.

Wood now moved to set aside the verdict, on the ground of a misdirection, relying upon the positive words of the statute.

LORD KENYON, C.J.—The direction was right, for such a holding now operates as a tenancy from year to year. The meaning of the statute was, that such an agreement should not operate as a term; but what was then considered as a tenancy at will has since been properly construed to enure as a tenancy from year to year.

Per Curiam.

Rule refused.

THIS, and the preceding case, though loudly impugned by Mr. Watkins, in his able treatise on Conveyancing, have never since been invalidated by judicial decision. Nor does either of them seem inconsistent with the Statute of Frauds. For the effect of the Judicature Acts, see notes to the last case.

The Statute of Frauds enacts, in s. 1, "That all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of, any messuages, manors, lands, tenements, or hereditaments, made or created by liberty and seisin only, or by parol, and not put in writing and signed by the parties so making and creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making such parol leases to the contrary notwithstanding." Statute of Frauds, s. 1.

S. 2. "Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount to two-third parts at least of the value of the thing demised." S. 2.

Now it is clear that the words of these sections are satisfied by holding that a parol demise for more than three years creates, *in the first instance*, an estate at will, strictly so called, which estate at will, when once created, may, like any other estate at will, be changed into a tenancy from year to year, by payment of rent, or other circumstances indicative of an intention to create such yearly tenancy: and this perhaps is all which was decided by the two cases; for, in *Doe v. Bell* we are expressly told that *the defendant had paid rent*; and though, in *Clayton v. Blakey*, there is no *express* mention of rent having been paid, yet, as the tenant had been in possession for three years, and that, under a rent (for the action was for double rent), it is more than probable that some payment of rent had taken place during that period. To deny to such a payment the effect of creating a tenancy from year to year, in cases where the letting was by parol for more than three years, would be to contravene, rather than obey, the Statute of Frauds, since it evidently means that such a parol lease shall enure in every respect as a lease at will. Now one of the incidents of a lease at will is its convertibility, by payment of rent, Tenancy at will converted into tenancy from year to year if facts show such intention.

into a tenancy from year to year; see *Doe v. Weller*, 7 T. R. 478; *Roe v. Lees*, 2 W. Bl. 1171; and *Regnart v. Porter*, 7 Bing. 453, *ubi, per* Tindal, C.J.: "If a party enters and pays, or promises to pay a rent certain, or settles it in account (see *Cox v. Bent*, 5 Bing. 185), a new agreement may be presumed, under which the landlord may have the right to distrain."

Effect of parol demise for more than three years without other facts.

Where entry but no payment of rent.

But the decisions (it is believed) have not gone so far as to establish that a parol lease for more than three years at a fixed rent will, without any other circumstance, create an interest from year to year, so as to give the tenant a right to enter indefeasible except by half-a-year's notice, ending with the expiration of the year. Such a construction would, perhaps, be incompatible with the strict letter of the Statute of Frauds; nor (it is believed) has it ever been held that a parol demise for more than three years, at a fixed rent, even when coupled with the lessee's entry under it, will, before payment or acknowledgment in account of any part of the rent reserved, have the effect of rendering him tenant from year to year. Indeed, the contrary appears involved in *Doidge v. Bowers*, 2 M. & W. 365, where three persons entered under a lease for seven years, not signed by the lessor, and, therefore, inoperative under the Statute. Payments of rent were proved, but were not shown to have been made with the assent of one of the three. It was held that, as against her, there was no evidence of a tenancy from year to year, Parke, B., saying: "*Under the original contract no demise could be created, but a mere tenancy at will.* Then, in order to constitute a new tenancy, it must be shown that all the three parties to the instrument agreed to vary it by a new contract for a tenancy from year to year;" see *Denn v. Fearnside*, 1 Wils. 176; *Goodtitle v. Herbert*, 4 T. R. 680; *Coatsworth v. Johnson*, 55 L. J. Q. B. 220.

Origin of tenancy from year to year.

Tenancies from year to year seem to have owed their origin to the prevalence of a strong and very natural feeling of the justice and good policy of allowing a tenant who has sowed, to reap. This feeling manifested itself during the earliest ages of our law in the doctrine of *emblements*, which entitled a tenant at will to the crops he had sowed, and gave him free ingress and egress to reap and carry them, after the determination of his tenancy by the landlord. (Litt. sec. 68, and the *Commentary*.) Now the land could have been of but very little value to the landlord while covered with crops belonging to his late tenant, and subject to such a right of entry; and to give those crops and that

right of entry to a tenant at will was in effect to say that his *enjoyment* of the land should not be put an end to by the determination of the landlord's will respecting his estate in it. But people were apt to confound the distinction between the right of the enjoyment and the right to the estate; and seeing that the landlord could not arbitrarily put an end to the former, they concluded that he was similarly restrained as to the latter. "So long ago," says Lord Kenyon, in *Doe v. Watts*, 7 T. R. 85, "as the time of the year-books, it was held that a general occupation was an occupation *from year to year*, and that the tenant could not be turned out of possession without *reasonable notice to quit*." This passage in the year-books (which is also referred to by Buller, J., in *Right v. Darby*, 1 T. R. 163, and Willes, J., in *Jones v. Mills*, 10 C. B. N. S. 788), is 13 Hen. 8, 15 b, *ubi, per Wilby (Willoughby)*, "*Si le lessor ne done a luy garnir devant le demy an il justifiera in auter an et issint de an in an*." And it was better for the lessor himself to establish this custom, since a late tenant at will entitled to emblements would have had the whole profits of the land, from the determination of the will till the harvesting of the crops, without paying any rent for it; whereas the tenant from year to year pays rent until the day on which he quits the premises.

It is now well settled (subject to the Agricultural Holdings Act, 1883, s. 33, mentioned below, p. 129), that the *reasonable notice to quit* to which the tenant is entitled, is half-a-year's notice, ending with the period at which his tenancy commenced; see *Doe v. Porter*, 3 T. R. 13; *Wilkinson v. Calvert*, 3 C. P. D. 360; *Barlow v. Teal*, 15 Q. B. D. 403, 501; *Sidebotham v. Holland*, (1895) 1 Q. B. 378. The rule, established by the decisions, is that the notice must be a *half-year's notice*; it must be given, as the year-book says, "*devant le demy an*," subject to this qualification in the case of tenancies which can be ended on one of the four usual feast days, that the notice to quit on that feast day is sufficient, if given on or before the feast day next but one before it, though there be fewer than 182 days between the two feast days; *Roe v. Doe*, 6 Bing. 574; *Doe v. Kightley*, 7 T. R. 63; *Howard v. Wemsley*, 6 Esp. 53; *Doe v. Wrightman*, 4 Esp. 5; *Doe v. Green*, Id. 198; but the notice is not sufficient if it is given after the next but one preceding feast day, though given more than 182 days beforehand, *e.g.*, notice given on 26th March to quit on 29th September;

To what notice to quit tenant from year to year is entitled.

Morgan v. Davies, 3 C. P. D. 260. In *Sidebotham v. Holland*, (1895) 1 Q. B. 378, it was argued that a half-year is, not 182, but 183 days, but the point was not decided; see Co. Litt. 135 b. A period of six lunar months of 28 days is not a half-year, and two such periods cannot make a year, the division of time with reference to which the reasonable notice to quit required by law is calculated; *Johnstone v. Hudlestone*, 4 B. & C. 922, 932, *per* Bayley, J.; see also *Catesby's Case*, 6 Rep. 61.

The rule that half-a-year's notice is necessary and sufficient does not apply when there is an express agreement as to what notice shall be given. In *Rogers v. Hull Dock Co.*, 34 L. J. Ch. 165, Wood, V.-C., was of opinion that in a written agreement for a yearly tenancy, "determinable by six months' notice," the word "months" meant *lunar* months, there being no proof of any custom or usage of the district attaching a different meaning to the word; see *Barlow v. Teal*, 15 Q. B. D. 501, *per* Brett, M.R.

Must end
when.

The notice must, as a rule, unless there be an express agreement to the contrary (*Doe v. Grafton*, 18 Q. B. 496), end with the period at which the tenancy commenced; that is, on the last day of the year of the tenancy; *Sidebotham v. Holland*, *supra*; but a notice which ends on the anniversary of the day on which the tenancy commenced is good; *Id.* The tenancy, *primâ facie*, commences on the actual day of demise or entry; *Doe v. Matthews*, 11 C. B. 675; *Sandill v. Franklin*, L. R. 10 C. P. 377; but where a tenant has paid, or agreed to pay, rent quarterly or half-yearly, the tenancy, *primâ facie*, commences at the beginning of the first whole quarter or half-year for which rent is paid, or agreed to be paid, though the tenant in fact came in on some earlier or later day; *Doe v. Johnson*, 6 Esp. 10; *Savage v. Stapleton*, 3 C. & P. 275; *Doe v. Grafton*, and *Sandill v. Franklin*, *supra*. Such inference, however, cannot be drawn where there is an express agreement as to the date of the commencement of the tenancy; *Sidebotham v. Holland*, *supra*. Where a tenant holds over and becomes a yearly tenant, then, if the time of the year at which the term originally commenced and the time at which it ended be not the same, the notice must, *primâ facie*, be made to expire at the former time; *Doe v. Dobell*, 1 Q. B. 806; *Berrey v. Lindley*, 3 M. & Gr. 498; *Kelly v. Patterrson*, L. R. 9 C. P. 681. Where, however, an assignee of the original tenant held over and became yearly tenant, it was held that his yearly tenancy commenced at the time when the original

tenancy ended, and not at the time when it began; *Doe v. Lines*, 11 Q. B. 402; so also where an underlessee held over and became yearly tenant; *Kelly v. Patterrson*, *supra*.

The tenancy is determined by a proper notice to quit, though the notice has been withdrawn or waived; "if the notice is given, the tenancy is at an end; the parties may, by a parol contract, create a new tenancy, which is what is meant by 'withdrawing the notice,' but the old tenancy no longer exists;" *Tayleur v. Wildin*, L. R. 3 Ex. 303. In *Inchiquin v. Lyons*, 20 L. R. Ir. 474, the C. A. in Ireland disagreed with this decision.

Withdrawal
of notice.

If on the creation of a tenancy from year to year the parties do not use words showing that they contemplate a tenancy for two years at least, the tenancy is determinable at the end of the first as well as of any subsequent year; *Doe v. Smaridge*, 7 Q. B. 957; and as to words which show an intention to create a tenancy at least for two years, see *Doe v. Green*, 9 A. & E. 658; *Denn v. Cartright*, 4 East, 29; *R. v. Chawton*, 1 Q. B. 247; *Doe v. Geekie*, 5 Q. B. 841; *Gardner v. Ingram*, 61 L. T. 729.

Tenancy
determinable
at end of
first year.

Under the Agricultural Holdings Act, 1883, s. 33, in the case of holdings to which this Act applies (see s. 54), "where a half-year's notice expiring with a year of tenancy is by law necessary and sufficient for determination of a tenancy from year to year, . . . a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same:" unless the parties have agreed in writing that this section shall not apply, or the tenant is adjudged bankrupt. This section does not apply where the parties have by their contract provided for a half-year's notice, a six months' notice, or any other notice, for then the notice is not required "by law," but by contract; *Wilkinson v. Calvert*, 3 C. P. D. 360; *Barlow v. Teal*, 15 Q. B. D. 403, 501.

Agricultural
Holdings Act,
1883.
S. 33.

A month's notice has been held to be the proper notice on a monthly tenancy; *Doe v. Hazell*, 1 Esp. 93; *Beamish v. Cox*, 16 L. R. Ir. 270, 458. On a weekly tenancy it was once doubted whether any notice to quit is necessary; see *Towne v. Campbell*, 3 C. B. 922, where Cresswell, J., cited *Huffel v. Armisted*, 7 C. & P. 56. But a reasonable notice is, it is apprehended, clearly necessary; and the safest plan is to give a week's notice; see *Jones v. Mills*, 10 C. B. N. S. 788, where Erle, C.J., Williams, Willes, and Byles, JJ., all thought some notice necessary.

Monthly
tenancy.

Weekly
tenancy.

Williams, J., thought the notice must be a week's notice, but Willes, J., refused assent to the proposition that "as a matter of law a week's notice is necessary." In *Harvey v. Copeland*, 30 L. R. Ir. 412, O'Brien and Gibson, JJ., held that a week's notice was "necessary and sufficient in law;" while Johnson, J., considered only a reasonable notice requisite. The decision in *Sandford v. Clarke*, 21 Q. B. D. 398, that a weekly tenancy comes to an end at the end of every week without notice, was expressly disapproved of in *Bowen v. Anderson*, (1894) 1 Q. B. 164. There is no objection in law to a tenancy determinable by a week's notice to quit and a reasonable time being allowed after the expiration of the notice for the tenant to remove his goods; *Cornish v. Stubbs*, L. R. 5 C. P. 334; *Mellor v. Watkins*, L. R. 9 Q. B. 400. If premises are let at a weekly, or monthly, or quarterly rent, the tenancy is, *prima facie*, a weekly, or monthly, or quarterly tenancy, respectively; *Wilkinson v. Hall*, 3 B. N. C. 508.

Reasonable
time to remove
goods.

Tenancy at
will may still
be created.

Instances.

Person enter-
ing under
agreement
to purchase.

Became
tenant from
year to year
on payment
of rent with
reference
to yearly
tenancy.

There is no doubt that a tenancy *at will*, strictly speaking, may still be created; *Ball v. Cullimore*, 5 Tyrwh. 753; *Camden v. Batterbury*, 5 C. B. N. S. 808. It may be so by express words; *Richardson v. Langridge*, 4 Taunt. 128; *Cudlip v. Rundle*, 4 Mod. 9; *R. v. Fillongley*, Cald. 569; *Doe v. Cox*, 11 Q. B. 122. A person who holds rent-free by the permission of the owner is a tenant at will; *R. v. Collett*, Russ. & Ry. C. C. 498; *e.g.*, a minister placed in possession by trustees for the congregation; *Doe v. Jones*, 10 B. & C. 718; *vide tamen Wilkinson v. Malin*, 2 Tyrwh. 544. So, at common law, is a person who has not paid rent and who entered under an agreement for a lease; *Regnart v. Porter*, 7 Bing. 451; *Riseley v. Ryle*, 11 M. & W. 16; *Coatsworth v. Johnson*, 55 L. J. Q. B. 220; or for an assignment of a lease; *Pollen v. Brewer*, 7 C. B. N. S. 371; or for a sale; *Doe v. Miller*, 5 C. & P. 595; *Howard v. Shaw*, 8 M. & W. 118; although he has paid part of the purchase money; *Id.*; or has paid interest; *Doe v. Chamberlaine*, 5 M. & W. 14.

On payment of rent, however, he becomes tenant from year to year; *Mann v. Lovejoy*, Ry. & M. 355; *Saunders v. Musgrave*, 6 B. & C. 524; *Chapman v. Towner*, 6 M. & W. 100; provided that he paid it *with reference to a yearly tenancy*; *per Parke, B.*, *Braythwayte v. Hitchcock*, 10 M. & W. 494, and *Doe v. Wood*, 14 Id. 682. In the former case Parke, B., observed:—"Although the law is clearly settled

that where there has been an agreement for a lease, and an occupation without payment of rent, the occupier is a mere tenant at will, yet it has been held that if he subsequently pays rent under that agreement he thereby becomes tenant from year to year. Payment of rent, indeed, must be understood to mean *payment with reference to a yearly holding*; for in *Richardson v. Langridge*, 4 Taunt. 128, a party who had paid rent under an agreement of this description, but had not paid it with reference to a year, or any aliquot part of a year, was held, nevertheless, to be a tenant at will only."

The reason is, because the payment of rent by the occupier with reference to a yearly holding, and the receipt of it by the landlord, is evidence of the intention of the parties that a yearly tenancy should be created. Thus, where a person has entered under a void lease from A. and B., and paid them rent, his subsequent payment of rent to A. alone, after notice that A. has acquired B.'s interest by assignment, is evidence of a new contract of tenancy from year to year with A. alone; *Arden v. Sullivan*, 14 Q. B. 832. It is however only evidence: *Doe v. Crago*, 6 C. B. 98; and although in the absence of other circumstances, showing a contrary intention, it would be deemed conclusive; *Bishop v. Howard*, 2 B. & C. 100; yet, where it appears that the parties do not intend it to have that effect, the tenancy at will remains unaffected by it. Thus in *Doe v. Cox*, 11 Q. B. 122, where ejectment was brought by mortgagees against mortgagor, the mortgage deed contained the following clause: "And the mortgagor hereby agrees to become tenant to the mortgagees henceforth during their will and pleasure, at and after the rate of 25*l.* 4*s.* per year, payable quarterly;" the defendant having made default in payment of the instalments of the mortgage money and rent, the mortgagees distrained for four quarters' rent, and then gave a week's notice to quit and brought ejectment. The defendant contended that he was, under the circumstances, tenant from year to year, and that a half year's notice was requisite; Coltman, J., however, decided that the defendant continued tenant at will, and that the notice was sufficient; and the Queen's Bench were of opinion that he was right. So in *Doe v. Davies*, 7 Exch. 89, a tenancy at will between a mortgagee and mortgagor was held to exist notwithstanding the reservation of a yearly rent; see also *Pinhorn v. Souster*, 8 Exch. 763; *Re Stroud*, 8 C. B. 502; *Doe v.*

This presumption may be rebutted.

Doe d. Basto v. Cox.

Ongley, 10 C. B. 25 ; *Woodbridge v. Colneis*, 13 Q. B. 269 ; *West v. Fritche*, 3 Exch. 216 ; and *Smith v. Widlake*, 3 C. P. D. 10.

Mere payment
of sums
described as
rent not
enough if in-
tention nega-
tived by other
facts.

It is important to observe that the law will not imply the existence of a tenancy from year to year from the fact of payment, after entry upon the land, of sums of money described as rent, if on looking at the whole of the circumstances of the case it appears not to have been the intention of the parties to create the relation of landlord and tenant. This rule is well illustrated by *Camden v. Batterbury*, 5 C. B. N. S. 808. In this case a builder entered upon land under a building agreement under seal, whereby, after the erection of certain buildings thereon which he agreed to erect, leases were to be granted to him, and in the meantime he was to pay such yearly sums or rents as would be payable under the leases when actually granted. The contract also contained a proviso for re-entry in case any portion of the yearly sums or rents should be unpaid for twenty-one days. The builder assigned his interest under the agreement to a third person, who entered on the land, erected some buildings on it, paid the stipulated yearly sums for some time, and then during the course of a year assigned his interest to another. An action for use and occupation of a portion of the land was afterwards brought by the landowner against the assignee of the builder. Under these circumstances the court was of opinion that neither the builder nor his assignee had acquired any estate in the premises under the building agreement, and that no tenancy from year to year had arisen ; for the yearly sums had been payable by the builder, not as rent for the occupation of the premises, but as stipulated collateral sums for the right to devote the premises to the purposes of the agreement ; and the payments by his assignee had been made, not in discharge of any original liability of his own, but in discharge only of the builder's personal liability under the agreement, against which his assignee had agreed to indemnify him ; and that therefore the assignee was not liable to pay any rent, since, granting that he was tenant at will, he was not so upon the terms of paying rent. Williams, J., stated the rule governing such cases as follows :—

Williams, J.

“Where a tenancy from year to year is implied from periodical payments, *it is because you cannot account for the payment of the money upon any other hypothesis than that it is paid for rent*, and hence the law implies a tenancy from year

to year." This case was treated by Brett, L.J., as an authority in *Adams v. Hagger*, 4 Q. B. D. 480.

It has already been shown in the notes to *Keech v. Hall* and *Moss v. Gallimore*, ante, vol. i., p. 525, that there are certain cases in which a mortgagor in possession becomes tenant at will to the mortgagee. A vendor, who remains in possession after having conveyed, is not tenant at will to the vendee; *Tew v. Jones*, 13 M. & W. 12; because he is not in possession necessarily by the consent of the vendee; and the relation of landlord and tenant can only be created by consent of both parties; *Brown v. Storey*, 1 M. & Gr. 117; *Towerson v. Jackson*, (1891) 2 Q. B. 484; but it may perhaps be laid down that wherever a person is in possession of land, in which he has no freehold estate, nor tenancy for any certain term, but which he nevertheless holds by the consent of the true owner, that person is tenant at will, and as such is liable to pay for his occupation, if beneficial; *Ibbs v. Richardson*, 9 A. & E. 849; *Howard v. Shaw*, 8 M. & W. 119; unless there be a stipulation that he shall occupy rent-free; per Alderson, B., in *Howard v. Shaw*; *Winterbottom v. Ingham*, 7 Q. B. 611. In this last case it was held that a party remaining in possession under a contract for purchase which ultimately fails for want of title is not liable to pay for such occupation, though beneficial, up to the time of the determination of the contract. But if he remain in after its determination, he is liable for the subsequent occupation; *Howard v. Shaw*, supra.

On account of the peculiar origin of a tenancy from year to year, and its being still in contemplation of law a tenancy *at will*, it seems to have been thought by three judges, in *Doe v. Wells*, 10 A. & E. 427, that it would be possible to put an end to it by the parol consent of both parties, such parol consent not operating as a *disclaimer*, which cannot be by mere words (*Hunt v. Allgood*, 10 C. B. N. S. 253; *Jones v. Mills*, Id. 788), nor as a *surrender*, which would be opposed to the Statute of Frauds, but as a *determination of the will* of both parties.

But, until determined, the tenancy from year to year is a term which will pass to the personal representative; *Doe v. Wood*, 14 M. & W. 682.

So a tenant from year to year, demising from year to year, or for a term of years, has a reversion which enables him to distrain; *Curtis v. Wheeler*, Moo. & M. 493; see *Oxley v. James*, 13 M. & W. 209, where a tenant from year to year

Mortgagor in possession.

Vendor after conveyance.

General rule.

Tenancy from year to year determinable by consent.

Passes to personal representatives.

Reversion after term.

Oxley v. James.

demised for thirty-four years to the plaintiff, who sub-let for eighteen years and a quarter to the defendant, against whom he declared in covenant for non-repair, pursuant to the terms of the sub-lease : and it was held that the plaintiff, if he could not in pleading describe his interest as an absolute term for thirty-four years (which *seem* he could after its expiration), might clearly allege it to be a tenancy for thirty-four years, "provided the tenancy from year to year should so long continue."

Determina-
tion of tenancy
at will.

If a person who has created a tenancy at will assigns or transfers his reversion, that is a determination of the will, if the tenant have notice of it; *Disdale v. Iles*, 2 Lev. 88; *Doe v. Thomas*, 6 Exch. 854; *Doe v. Davies*, 7 Exch. 89. So also the transfer by a tenant at will of his interest to a third person determines the tenancy if the landlord have notice of it; *Carpenter v. Colins*, Yelv. 73; *Pinhorn v. Souster*, 8 Exch. 763; *Melling v. Leak*, 16 C. B. 652, 669.

GEORGE v. CLAGETT.

TRINITY.—37 G. 3.

[REPORTED 7 T. R. 359 (4 R. R. 762).]

If a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal.

ON the trial of this action, which was *assumpsit* for goods sold and delivered to the amount of 142*l.* 1*s.* 9*d.*, before Lord Kenyon at the Guildhall Sittings, the case appeared to be this: The plaintiff, a clothier at Frome, employed Messrs. Rich and Heapy in London, Blackwell-hall factors, as his factors under a commission *del credere*, who, besides acting as factors, bought and sold great quantities of woollen cloths on their own account, all their business being carried on at one warehouse. The factors sold at twelve months' credit, and were allowed two and a half *per cent.*

On the 30th Sept. 1795, Delvalle, a tobacco broker, and who had been in habits of dealing with the defendants, bought several parcels of tobacco of them, and gave them in payment a bill of exchange for 1,198*l.* 16*s.*, drawn by one Fisher on Rich and Heapy, on the 24th Sept. 1795, payable two months after date to J. Stafford, who indorsed to Delvalle, who indorsed it over to the defendants, it having been previously accepted by Rich and Heapy. On the 12th Oct. 1795, the defendants bought a quantity of woollen cloths for exportation of Rich and Heapy, amounting to 1,237*l.* 18*s.* 3*d.* at twelve months' credit; the goods were taken out of one general mass in Rich and Heapy's warehouse; Rich and Heapy made out a bill of parcels for the whole in their own names, and the defendants did not know that any part of the goods belonged to the plaintiff. Early in November, 1795, Rich and Heapy became bankrupts; and afterwards, on the 20th of the same month, the plaintiff gave the defendants notice not to pay Rich and Heapy for certain cloths specified, part of the above, amounting to 142*l.* 1*s.* 9*d.*, they having been his property,

and having been sold on his account by Rich and Heapy on commission. The question was, Whether the defendants were or were not entitled to set off their demand against Rich and Heapy on the bill of exchange, on the ground that the defendants dealt with them as principals; Lord Kenyon was of opinion that they were, as well on principle as on the authority of *Rabone v. Williams* (a); and a verdict was accordingly found for the defendants.

A rule having been obtained, calling on the defendants to show cause why the verdict should not be set aside, and a new trial had, on the authority of the case of *Estcott v. Milward*, Co. Bank. Laws, 236:

Gibbs and *Giles* were now to have shown cause against that rule: but

Erskine and *Walton* were called upon to support it. They relied on the cases of *Scrimshire v. Alderton* (b), and *Estcott v. Milward*, as reported in Co. Bank. Laws, to show that under the circumstances of this case the principal might resort to the buyer at once, he having given notice before actual payment by the defendants to the factors.

But a more accurate note of the case of *Estcott v. Milward* (c) having now been obtained from Mr. Justice Buller, before whom that case was tried, and read:

(a) *Rabone, jun., v. Williams*, Midx. Sittings after Mich. 1785; which was thus stated:—Action for the value of goods sold to the defendant by means of the house of Rabone, sen., and Co., at Exeter, factors to the plaintiff. The defendant, the vendee of the goods, set off a debt due to him from Rabone and Co., the factors, upon another account, alleging that the plaintiff had not appeared at all in the transaction, and that credit had been given by Rabone and Co., the factors, and not by the plaintiff. Lord Mansfield, C.J.—“Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet

that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled.” Upon this opinion, the rest, being a mere matter of account, was referred. In *Bayley v. Morley*, London Sittings after Mich. 1788, Lord Kenyon recognised the law of this case.

(b) 2 Str. 1182.

(c) London Sittings after Mich. 1783. Action for goods sold. The goods were sold by Farrar, a corn factor, who gave no account of the sale to the plaintiff, nor made any entry of it in his books. He was insolvent for some time before, and avoided all dealing for a month, had desired that there might be no buying in his name, and had not dealt with the defendant for a year before, but was then in his debt. There was a verdict for the plaintiff on the ground of fraud.

The court were clearly of opinion that the directions given by the learned judge on the trial of this cause were right, and that this case was not distinguishable from that of *Rabone v. Williams*. Therefore they

Discharged the rule (*d*).

(*d*) The same point was also ruled by Lord Kenyon in *Stracey, Ross, and others, v. Deey*, London Sittings after Mich. 1789. *Assumpsit* for goods sold; pleas *non assumpsit* and a set off. The plaintiffs jointly carried on trade as grocers, but Ross was the only ostensible person engaged in the business, and appeared to the world as solely interested therein. By the terms of the partnership, Ross was to be the apparent trader, and the others were to remain mere sleeping partners. The defendant was a policy-broker, and being indebted for grocery (as he conceived) to Ross, he effected insurances and paid premiums on account of Ross solely, to the amount of his debt, under the idea that one demand might be set off against the other. Ross's affairs being much deranged, payment of the

money due from the defendant was demanded by the firm, and was refused by him upon the ground of his having been deceived by the other partners keeping back, and holding out Ross as the only person concerned in the trade. Lord Kenyon, C.J., was of opinion, that as the defendant had a good defence by way of set-off as against Ross, and had been by the conduct of the plaintiffs led to believe that Ross was the only person he contracted with, they could not now pull off the mask and claim payment of debts supposed to be due to Ross alone, without allowing the parties the same advantages and equities in their defence that they would have had in actions brought by Ross. Verdict for the defendant. (S. C. 2 Esp. 469 n.)

A REFERENCE to the provisions of the Judicature Acts, with regard to rights of set-off and counterclaim, will be found at the conclusion of this note.

The decision in the principal case too clearly results from principles of natural equity to need much discussion or explanation. It has ever since been followed. See *Coates v. Lewes*, 1 Camp. 444; *Blackburn v. Scholes*, 2 Id. 343; *Carr v. Hinchliff*, 4 B. & C. 551; *Taylor v. Kymer*, 3 B. & Ad. 334; *Bastable v. Poole*, 5 Tyr. 111; *Purchell v. Salter*, 9 Dowl. 517, 1 Q. B. 197. In *Sims v. Bond*, 5 B. & Ad. 393, the rule was thus expressed by Lord Denman: "It is a well-established rule of law, that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent, or the principal, may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party." (See further on this subject in the notes to *Thomson v. Davenport*, *post*, pp. 400 *et seq.*)

Rule in contracts with agent of undisclosed principal.

Where party
contracting
has notice of
the agency.

However, the latter part of this rule only applies where the party contracting has not the means of knowing that the party with whom he contracts is but an agent. If he have the means of knowing, and, though he may not be expressly told, still must be supposed to have known, that he was dealing not with a principal, but with an agent, the reason of the above rule ceases, and then *cessante ratione, cessat lex*.

*Baring v.
Corrie.*

Thus in *Baring v. Corrie*, 2 B. & Ald. 137, Coles and Co., who were brokers, and also merchants, sold, in their own names, to Corries, sugars belonging to Barings, who brought this action for their price. The true nature of the contract was entered by Coles and Co. in their broker's book, which the defendants might, if they pleased, have seen; nor had Coles and Co. the possession of the sugars, which were lying in the W. I. Docks, whence, by the usage of the docks, they could not have been taken without the order of the plaintiffs, whose principal clerk signed the delivery order. Under these circumstances, the court held that the defendants had no right to set off, against the plaintiffs' demand for the price of the goods, a debt due to them from Coles and Co. "It is to be observed," said Bayley, J., "that the plaintiffs did not trust the brokers with either the muniments of their title, or the possession of the goods, as was done in both *Rabone v. Williams* and *George v. Clagett*. There is another circumstance by which the defendants might easily have ascertained whether Coles and Co. acted as brokers or not. According to the usual course of dealing, a broker is bound to put down in his book an account of the sales made by him in that capacity, and in fact that was done in this case, so that if the defendants had asked to see the book, they would instantly have discovered whether Coles and Co. acted as brokers or not. I therefore think, that the plaintiffs did not by their conduct enable Coles and Co. to hold themselves out as the proprietors of these goods and so to impose on the defendants; that the defendants were not imposed on; and even supposing that they were, that they must have been guilty of gross negligence. . . . I therefore cannot think that the defendants believed, when they bought the goods, that Coles and Co. sold them on their own account; and if so, they can have no defence to this action." See further *Maanss v. Henderson*, 1 East, 335; *Moore v. Clementson*, 2 Camp. 22.

Where pur-
chaser believes
that factor has

In *Warner v. M'Kay*, 1 M. & W. 591, it was held by the Court of Exch. that a buyer might set off payments made to

a factor, if he believed that the factor had a right to sell, and did sell, to repay himself advances; but see the observations on this case in *Smart v. Sandars*, 3 C. B. 399, and in *Fish v. Kempton*, 7 Id. 694, where it was held that knowledge, by the buyer of goods, that the vendor sold them as factor disentitled him to set off a debt due by such factor in an action by the principal.

right to sell
to repay
advances.

In *Cooke v. Eshelby*, 12 App. Cas. 271, the buyer admitted that he had no belief, one way or the other, whether the person who sold to him was acting on his own account or for a principal, and it was held that he could not set off a debt due from the agent in an action by the principal for the price of the goods. "The ground upon which all these cases have been decided is that the agent has been permitted by the principal to hold himself out as the principal, and that the person dealing with the agent has believed that the agent was the principal, and has acted on that belief;" Id., *per* Lord Halsbury.

Cooke v.
Eshelby.

Where the buyer's agent knows that the seller is only an agent, there can be no set-off, although the buyer himself is not informed of the real facts; *Dresser v. Norwood*, 17 C. B. N. S. 466.

Knowledge
of buyer's
agent.

Constructive authority to sell in his own name is sufficient; therefore, if the goods be intrusted to a factor, who has by custom an implied authority to sell in his own name, the right of set-off will not be defeated by showing a prohibition from the principal to the factor to sell in his own name; *Ex p. Dixon*, 4 Ch. D. 133.

Implied
authority of
agent.

The set-off, to be available, need not exist at the time of the sale; if it arise before notice of the real ownership it is sufficient; see *per* Parke, B., in *Salter v. Purchell*, 1 Q. B. 213. It will be seen that, in *Stracey v. Deey*, *ante*, p. 137, note (d), the debt which was set-off became due, *after* the sale of the goods, to the partner who was allowed to act as apparent owner of the goods sold.

It is sufficient
if set-off arises
before notice
of real
ownership.

The general rule deducible from all the cases cannot be better expressed than in the words of Willes, J., in *Semenza v. Brinsley*, 18 C. B. N. S. 467:—In order to make a valid defence within the rule laid down in the principal case, it is necessary to show "that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods; that that person sold them as his own goods in his own name, as principal, with the authority of the plaintiff; that the defendant *dealt with him as, and believed*

What must
appear in
order to make
good a defence
against the
principal.

him to be, the principal in the transaction; and that before the defendant was undeceived in that respect, the set-off accrued." See also *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38, 47.

Montagu v. Forwood.

The principle of *George v. Clagett* has been held to apply in favour of a person employed by an agent in his own name to collect money due to the principal, so that, having collected the money, he was entitled to set off a debt due to him from the agent against the claim of the principal for the money collected; *Montagu v. Forwood*, (1893) 2 Q. B. 350.

Unliquidated damages.
Turner v. Thomas.

In *Turner v. Thomas*, L. R. 6 C. P. 610, it was sought to extend the principle to a case where the claim was for unliquidated damages. The action was by seller against buyer for non-acceptance of goods, and the seller's agent, with whom the buyer had dealt in the belief that he was the owner of the goods, having become bankrupt, the buyer sought to avail himself against the principal of a mutual credit with the agent. The court disallowed the set-off on the ground that it could not be maintained against a claim for unliquidated damages, and that the defence set up was not a defence against the factor, but only a special mode of settling account with his assignees upon his bankruptcy, and consequently did not come within the principle of *George v. Clagett*.

Analogy of
George v. Clagett
followed in
other cases.

Similar in principle to the decision in *George v. Clagett* is that of *Stackwood v. Dunn*, 3 Q. B. 822, where it was held that, in an action of *indebitatus assumpsit* against A., he might plead that the promises were made by himself and B. jointly, and that they had a set-off. So also in the case of a partner allowed by the firm to appear as the sole owner of partnership property; see *Gordon v. Ellis*, 2 C. B. 821; and compare *Spurr v. Cass*, L. R. 5 Q. B. 656. The decision in *Stackwood v. Dunn*, *supra*, besides being obviously just, is in substance consistent with the language of the statutes of set-off, 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24, (repealed, S. L. R. & C. P. Act, 1883, but see s. 5), which give the statutory right of set-off in cases in which there are mutual debts "between the plaintiff and the defendant"; see the judgment in *Isberg v. Bowden*, 8 Exch. 852.

Where goods sold by agent as his own, no set-off in

Where the goods are sold by an agent as his own, the buyer knowing nothing at the time of his principal, and the action is brought in the name of the agent, the defendant

could not, before the introduction of equitable defences, have set off at law a debt due to him from the *principal*. For in this case there is no concealment which can be in any way injurious to the buyer, nor is his position at all altered by the mode in which the action is brought; and the statutes of set-off apply only to cases where the mutual debts are due from the *plaintiff*, and from the *defendant*. See the notes to *Thomson v. Davenport*, *post*, p. 405, and the judgment in *Isberg v. Bowden*, 8 Exch. 852.

action by
agent of debt
due from
principal.

Still courts of law have frequently allowed pleas of set-off on equitable grounds in cases subsequent to *Isberg v. Bowden*, on allegations similar to those alleged in the plea in that case, viz., that the plaintiff was suing as a bare trustee for a third person against whom the defendant had a set-off, and had no beneficial interest himself in the sum sought to be recovered (see *Agra Bank v. Leighton*, L. R. 2 Ex. 56; *Thornton v. Maynard*, L. R. 10 C. P. 695; *Holmes v. Tutton*, 5 E. & B. 65, and *Cochrane v. Green*, 9 C. B. N. S. 448), thus practically recurring to the view taken in earlier decisions at law; see *Bottomley v. Brook*, 1 T. R. 621; *Rudge v. Birch*, Id. 622; cases which are referred to, *ante*, vol. i., p. 770. It seems, however, that the rule of equity has been stated too broadly in some of the cases at law, notably in *Cochrane v. Green*, *supra*; for to found such an equity it is not enough, as appears to have been assumed in that case, to show that the plaintiff is a bare trustee; there must be independent grounds giving the Court of Equity jurisdiction and calling for its intervention to enlarge the statutable right of set-off; see *per* Jessel, M.R., *Middleton v. Pollock*, 20 Eq. 29. See also *per* Fry, L.J., *Re Milan Tramways Co.*, 25 Ch. D. 587, 593.

Where agent
sues as trustee
for principal.

The provisions of the C. L. P. Act, 1860, which gave an extended right of joining parties as plaintiffs in actions, also gave to defendants an extended right of pleading a set-off. The Judicature Acts, and the rules made pursuant thereto, have also given to defendants an extended right of raising cross-claims in an action.

Common Law
Procedure Act,
and Judica-
ture Acts.

By these enactments it is competent for a defendant to set off, or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether sounding in damages or not, and the court and every judge thereof is empowered to grant to any defendant, in respect of any equitable estate or right, as well as any legal estate or right claimed by him, all such relief as he shall have properly

claimed by his pleading, and as the court or any judge thereof might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff. There are also provisions enabling the court to give a remedy or relief to defendants who claim to have rights over against third parties. See Judicature Act, 1873, s. 24; and R. S. C., Order XIX., r. 3; Order XVI., rr. 48, *et seq.* It seems, however, that a "set-off" is still distinct from a "counterclaim," and that the above provisions have not created new rights of "set-off" which were previously unknown either at law or in equity; see *Stooke v. Taylor*, 5 Q. B. D. 569, 575; *Stumore v. Campbell*, (1892) 1 Q. B. 314.

SMITH v. HODSON.

HILARY.—31 G. 3, B. R.

[REPORTED 4 T. R. 211.]

If a bankrupt on the eve of his bankruptcy fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods, in trover; but if they bring *assumpsit*, they affirm the contract, and then the creditor may set off his debt.

Where the defendant lent his acceptance to the bankrupts on a bill which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, yet the defendant, having paid the amount after the commission issued, and before the action brought by the assignees, is entitled to a set-off.

ASSUMPSIT for goods sold and delivered to the defendant by the bankrupts, before, and also by the assignees since, the bankruptcy. Pleas, *non assumpsit*, and a tender of 131*l.* 7*s.* 6*d.*, which the plaintiffs took out of court. There was also a set-off. At the trial at Guildhall before Lord Kenyon, a verdict was found for the plaintiffs, subject to the opinion of this court on the following case:—

In August, 1787, Lewis and Potter sold goods to the defendant to the amount of 42*l.*, and on the 4th of March, 1788, they drew a bill on him at two months, for 442*l.*, payable to their own order, although at that time he was indebted to them in 42*l.* only; which bill the defendant accepted. Lewis and Potter made the following entry in their books: “4th of March, 1788, received from James Hodson an acceptance, due 7th of May, 442*l.* to bills and notes; to provide 400*l.* On 26th April, several bills were refused payment by Lewis and Potter, some of which were presented by bankers on behalf of the indorsees. On the 28th April, 1788, the defendant went to the house of Lewis and Potter, and bought goods to the amount of 531*l.* 7*s.* 6*d.*, which were sent to him with a bill of parcels the same day: the goods were sold to the defendant at six months’ credit. On the 29th April, 1788, Lewis and Potter committed acts of bankruptcy.

On the 9th of May the commission issued, and they were duly declared bankrupts, and the plaintiffs chosen assignees of their estate and effects. The bill for 442*l.* drawn by the bankrupts, and accepted by the defendant, became due the 7th of May, 1788; the defendant did not pay it on that day, but in September following paid to Gibson and Johnson, the holders thereof, 200*l.* on account of the bill; and in October following, before the six months' credit upon the goods was expired, he paid the residue with interest. The jury thought the bankrupts gave an undue preference to the defendant in the sale: and gave a verdict for the plaintiffs, damages 400*l.* (a). The questions for the opinion of the court are, 1st, Whether the plaintiffs can support this action for the price of the goods? 2ndly, If they can support this action, whether the defendant cannot set off against it the money paid by him on the above-mentioned bill for 442*l.*?

Russell, for the plaintiffs, was desired by the court to confine himself to the second point, as they entertained no doubt upon the first. As to which he contended that, though the sale were good to charge the defendant in this action, yet he was not entitled to support his set-off under the 5 Geo. 2, c. 30, s. 28 (b). The words which will be relied on are *mutual credit*: but they were by no means intended to be used in so extensive a sense as the one now put on them by the defendant. The giving of *credit* is merely giving a future day of payment for a pre-existing debt; and, to entitle a defendant to set it off, it must exist previous to the act of bankruptcy. As, where goods are sold to be paid for at a future day, the vendee becomes a debtor for the value upon the delivery, though payment cannot be exacted from him till the day arrives; in the meantime the vendor is his creditor

(a) A fraudulent preference may be by way of sale; see *Cook v. Caldecott*, 1 M. & W. 522; *Ward v. Clark*, Id. 499; *Devas v. Venables*, 3 B. N. C. 400; *Cash v. Young*, 2 B. & C. 413. But in *Lee v. Hart*, 10 Exch. 555, 11 Id. 880, where the sale was real and to a person not a creditor, though at a gross undervalue and by an insolvent trader, the court doubted whether it could be deemed an act of bankruptcy.

(b) Which enacted, that where "there hath been mutual credit given by the bankrupt and any other person, or

mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the commissioners, &c. shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side, on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively." The corresponding enactment in the 46 & 47 Vict. c. 52, is contained in s. 38.

to that amount; and in that sense only is the word *credit* to be understood in the Act. This appears further from the subsequent words of the statute, for the commissioners are directed to *state the account* between the parties and claim or pay only so much as shall appear *due on the balance of such account*. In order, therefore, for a party to set off any demand, it must be such as may be made an item in the account, and either certain or reducible to a certainty at the time of the act of bankruptcy committed. The Act itself says that the balance of the account is to be made appear “on setting *such debts* against one another;” which plainly shows that nothing more was meant by the word *credits* than *such debts* as were payable at a future day. Then how does the statute apply to this case? There was no debt existing between the bankrupts and the defendant at the time of the bankruptcy; nor was it certain there ever would be one: for, in case of the defendant’s bankruptcy or refusal to pay, the holder might have proceeded against the estate of the drawers, and recovered the amount; and that, perhaps, after the defendant’s acceptance had been admitted as an item of account between him and the bankrupts; and, at all events, no debt could arise till after payment by the defendant, which was long after the bankruptcy, and therefore could not be set off; for at that time the bill was outstanding in the hands of third persons, and was therefore the subject of mutual credit, if at all, between them and the bankrupts. But in *Groome’s Case* (c), Lord Hardwicke was clearly of opinion that a debt arising on a contingency after the bankruptcy could not be set off; and it has been determined that, though a note indorsed after an act of bankruptcy may be proved under a commission against the drawer (d), yet it cannot be set off against an action by his assignees (e). The cases *Ex parte Deeze* (f), *Ex parte Prescott* (g), and *French, assignee of Cox v. Fenn* (h), were all of them cases where the bankrupts were actually indebted to the defendants before the bankruptcies in the sums which they set off against the demands of the assignees; which differs them materially from the present; but even supposing this were such a demand as could in a fair

(c) 1 Atk. 115, 119.

M. & W. 30.

(d) *Ex p. Thomas*, 1 Atk. 73.

(f) 1 Atk. 228.

(e) *Marsh v. Chambers*, 2 Str. 1234;
see, however, 6 G. 4, c. 16, s. 50, and 3

(g) Id. 230.

(h) Tr. 23 Geo. 3, Cooke, Bk. L. 2nd ed.

transaction be set off in a court of law under the statute, yet it cannot avail the defendant in this case, where the whole is vitiated by fraud. It therefore becomes material to examine what part of the transaction may be substantiated, and what is void. There is no fraud in the mere act of sale; and the defendant must be bound by that so far as he made himself liable for the amount of the goods; that would have been the case had the sale been made to a person who was no creditor of the bankrupts; but the objection arises to the fraudulent use now attempted to be made of the sale. No party is entitled to set off a demand against the assignees of a bankrupt, for which he could not have maintained an action, or which he could not have proved under a commission. Now, if the defendant could not have done either in the present instance before the bankruptcy, he shall not be permitted to recover the amount indirectly in this manner; for that would be to permit him to avail himself of his own fraud.

Gibbs, for the defendant, insisted first, That if the whole were to be considered as a *bonâ fide* transaction, the defendant was entitled to set off the sum paid under his acceptance; and 2ndly, That the finding of the jury, as to the undue preference, could not vary the case in favour of the plaintiffs in *this* action. The first question depends on the stat. 5 Geo. 2, c. 30, s. 28; the true construction of which is, that wherever there is *mutual credit* between the bankrupt and another person before the bankruptcy, the debts may be set off against each other, although one of them may accrue after the bankruptcy, and although that one debt could not form an item of an account, so as to enable the bankrupt and such other person to strike a balance. The plaintiff's argument, That nothing can be set off under the statute, but that which may form an item of an account at the time of the bankruptcy, and the payment of which is only postponed for a time, directly militates against the decision of *French v. Fenn*. If that case be law, the construction now attempted to be put on this statute by the plaintiff's counsel cannot prevail. In that case *Fenn* owed nothing to *Cox* previous to the bankruptcy; so here *Lewis* and *Potter* owed *Hodson* nothing previous to their bankruptcy; but *Fenn* had been entrusted by *Cox* with that upon which he probably would become his debtor, namely, the sale of the jewels, in which *Cox* was interested one-third part;

so Lewis and Potter had been intrusted by Hodson with that upon which they probably would become his debtors, *sc.* with his acceptance for 442*l.*, he having effects to the amount of 42*l.* only; there Fenn, upon the credit of the jewels intrusted to him, trusted Cox on another account; so here Lewis and Potter, on the credit of the acceptance intrusted to them, trusted Hodson on another account, namely, for the goods in question; there, after the bankruptcy of Cox, Fenn *received* a sum of money upon the sale of the jewels intrusted to him, which became due to Cox's estate; so here, after the bankruptcy, Hodson *paid* a sum of money upon the acceptance intrusted to them, for which he has a claim upon their estate. In that case the court allowed the set-off, and yet at the time of Cox's bankruptcy no balance could have been struck between the parties, because the defendant's claim arose from the produce of the pearls afterwards. What that produce would be, could not be known at the time of the bankruptcy, and consequently could not then form an item in an account between the parties. Secondly, The finding of the jury, as to the undue preference, is either nugatory as to the plaintiffs, or it operates as a ground of nonsuit. The plaintiffs have an option either to affirm or disaffirm the contract: if the former, the defendant is entitled to set off his demand; if the latter, though the plaintiffs might recover in trover, they cannot maintain this action. The jury found that there was a fraud *in the sale*; the plaintiffs cannot therefore contend that the fraud is confined to the *use* made of the sale. If the defendant had obtained his defence by fraud, it would not have availed; but it does not follow that, because there was a fraud in the sale of goods from the bankrupt to the defendant, the latter shall not set off a cross demand against the price of the goods. The fraud (if any) was in the sale of the goods; and the effect which it has is this (*i*), *viz.* that the bankrupt conveyed no property in the goods to the defendant, and that it was a naked delivery; if so, the plaintiffs should bring trover, not assumpsit.

Russell, in reply.—With respect to the case of *French v. Fenn*, which seems to have been principally relied on by the other side, there are two very material distinctions between that and the present case: there did exist mutual debts between the parties in

(*i*) Cooke, B. L. 2nd ed.

that case, though the precise amount was not actually ascertained at the time of the bankruptcy, but still it was capable of being reduced to a certainty at any time by the sale of the jewels ; and if Fenn had become a bankrupt instead of Cox, it cannot be denied but that Cox might have come in under Fenn's commission for a third of the value of those jewels. Again : In that case the jewels were in the hands of the party between whom and the bankrupt the account was to be settled, and the mutual debts and credits allowed ; whereas here the acceptance was in the hands of third persons at the time of the bankruptcy, without any certainty that they would ever be discharged by the defendant.

Cur. adv. vult.

Lord KENYON, C.J., now delivered the opinion of the court. His lordship, after stating the facts, said : We have considered this case, and are of opinion that the defendant has made a sufficient defence against the action in its present form, and consequently that a judgment of *nonsuit* must be entered. It is expressly stated in the case that the goods in question were delivered by the bankrupts to the defendant with a view to defraud the rest of the creditors ; and therefore an action might have been framed to disaffirm the contract, which was thus tainted with fraud ; for, if the assignees had brought an action of trover, they might have recovered the value of the goods. The statute 5 Geo. 2, c. 30, s. 28, enacts that where it shall appear to the commissioners that there hath been *mutual credit* between the bankrupt and any other person, or mutual debts between the bankrupt and any other person, before the bankruptcy, the commissioners or the assignees shall state the account between them, and one debt may be set against another ; and the balance only of such accounts shall be claimed and paid on either side, in the most extensive words ; and therefore we are perfectly satisfied with the cases *Ex parte Deeze* (*k*), and *French v. Fenn* (*kk*) ; but, if an action of trover had been brought instead of assumpsit, this case would have differed materially from those two ; because in both those cases the goods had got into the hands of the respective parties prior to the bankruptcy, and without any view of defrauding the rest of the creditors ; and, therefore, according to

(*k*) 1 Atk. 228.

(*kk*) Id. 230.

the justice of those cases, whether trover or assumpsit had been brought, the whole account ought to have been settled in the way in which it was, because the situation of the parties was not altered with a view to the bankruptcy: but here it was; and if trover had been brought, the defendant would have had no defence; and those cases would not have availed him. But this is an action on the contract, for the goods sold by the bankrupt: and, although the assignees may either affirm or disaffirm the contract of the bankrupt, yet, if they do affirm it, they must act consistently throughout; they cannot, as has often been observed in cases of this kind, blow hot and cold; and as the assignees in this case treated this transaction as a contract of sale, it must be pursued through all its consequences, one of which is, that the party buying may set up the same defence to an action brought by the assignees, which he might have used against the bankrupt himself; and consequently may set off another debt which was owing from the bankrupt to him. This doctrine is fully recognised in *Hitchin v. Campbell* (l), and in *King v. Leith* (m). Now here the assignees, by bringing this action on the contract, recognised the act of the bankrupt, and must be bound by the transaction in the same manner as the bankrupt himself would have been: and if he had brought the action, the whole account must have been settled, and the defendant would have had a right to set off the amount of the bill. Therefore on the distinction between the actions of trover and assumpsit, we are all of opinion that a judgment of nonsuit must be entered.

Judgment of nonsuit (n).

(l) 2 W. Bl. 827.

(m) 2 T. R. 141.

(n) See *Atkinson v. Elliott*, 7 T. R.

378; *Smith v. Gale*, Id. 364; and
Hulme v. Muggleston, 3 M. & W. 30.

THIS case is one of frequent reference upon the subject of *mutual credit*; but, as the leading case upon that branch of law is unquestionably *Rose v. Hart*, *post*, p. 288, it seems best to append any remarks on the doctrines of mutual credit and set-off to that decision.

The important principle, which *Smith v. Hodson* is here inserted as establishing, is, that *a man who has his option whether he will affirm a particular act or contract, must elect* Principle for which *Smith v. Hodson* is inserted.

either to affirm or disaffirm it altogether; he cannot adopt that part which is for his own benefit, and reject the rest. "He cannot," to use Lord Kenyon's expression, "blow hot and cold."

Established by
prior cases.
Wilson v.
Poulter.

This principle, as his lordship in the text observes, is older than the case of *Smith v. Hodson*. In *Wilson v. Poulter*, 2 Str. 859, an agent was secretly employed by a bankrupt after his bankruptcy to lay out money upon India bonds. The assignees, upon discovering the fact, seized some of the bonds in the agent's hands, accepting them as part of the estate, and then sued him for the money with which the other bonds were bought. The court held that the acceptance of part of the bonds was an affirmance of the agent's act, and that the assignees could not affirm one part, and disaffirm another. In *Billon v. Hyde*, 1 Atk. 126, a bankrupt had, in the course of dealing, after the bankruptcy, paid 3,000*l.* to petitioner, and petitioner had in the same dealing paid the bankrupt 712*l.* Lord Hardwicke decreed that the assignees, having adopted the bankrupt as their factor, must take him as such for every purpose, and that the 712*l.* should be allowed.

Billon v.
Hyde.

Doctrine fol-
lowed in later
cases.

The doctrine laid down in the text has been frequently acted on since the decision of *Smith v. Hodson*. It will be found laid down by Lord Ellenborough in *Hovil v. Pack*, 7 East, 164; and by Lord Tenterden, in *Ferguson v. Carrington*, 9 B. & C. 59; see also *Selway v. Fogg*, 5 M. & W. 83; *Russell v. Bell*, 8 Id. 277, 10 Id. 350.

Instances of
rule that an
election once
made is irre-
vocable.

So, if a party, with knowledge of fraud in a contract, which would enable him to avoid it, treat it as a subsisting contract, he cannot afterwards repudiate it; see *Campbell v. Fleming*, 1 A. & E. 40; and, generally, if a party, having the right to repudiate or affirm a transaction, take the latter course, he cannot afterwards recur to his right of repudiation; see *Richardson v. Dunn*, 2 Q. B. 218; *Jordan v. Norton*, 4 M. & W. 155.

Birch v.
Wright.

On the same principle proceeded the decision in *Birch v. Wright*, 1 T. R. 378, which establishes that a man cannot at once be treated both as a tenant and a trespasser. That was an action for use and occupation, brought against the defendant, who, on the 18th July, 1777, was tenant of certain land to Bowes, at a rent payable on the 12th May and 22nd November. Bowes had, on the 18th July, 1777, mortgaged the reversion to the plaintiff, who had brought an ejectment for the lands against the defendant, and obtained

judgment, laying his demise on 6th April, 1785, and had, in September, 1785, obtained possession. All rent had been paid up to the 22nd November, 1784, except 8*l.* 15*s.* Under these circumstances, the court held that the plaintiff was entitled to the unpaid rent, up to the day of the demise laid in the ejectment, *viz.*, 6th April, 1785; but not to any rent for the time which had elapsed since. "The plaintiff," said Buller, J., "has not waived the tort. He has brought his ejectment, and obtained judgment on it, which is insisting on the tort, and he cannot be permitted to blow both hot and cold at the same time. The action for use and occupation, and the ejectment, when applied to the same time, are totally inconsistent; for in one the plaintiff says the defendant is his tenant, and therefore he must pay him rent; in the other, he says he is no longer his tenant, and therefore he must deliver up the possession. He cannot do both. The plaintiff's counsel admit that an action would lie for the mesne profits; it is of course after ejectment, and may be maintained without proving any title. The ejectment is the suit in which the defendant is considered as a trespasser; and, unless the judgment in ejectment be laid out of the case, the tort is not waived. The defendant stands convicted on record by judgment as a trespasser from the 6th April, 1785."

For the like reason, in a case where the owner of the soil of a navigable lake over which there was a public highway had maintained a pier wrongfully erected upon his land, it was held that he could not maintain an action against the owner of steamboats for causing persons to pass over the pier for the purpose of navigating the lake; *Marshall v. Ulleswater Co.*, L. R. 7 Q. B. 166.

Marshall v.
Ulleswater
Co.

It seems extraordinary that the principal case of *Smith v. Hodson* should not have been mentioned in the argument of *Buchanan v. Findlay*, 9 B. & C. 738. It is true that it is distinguishable from that case; but the distinction was not then established, as it has been since, by *Thorpe v. Thorpe*, 3 B. & Ad. 580. In *Buchanan v. Findlay*, the assignees of certain bankrupts sued the defendants for money had and received by the defendants to the use of the bankrupts before, and of the assignees after, the bankruptcy. The bankrupts, who were merchants at Liverpool, had remitted a bill to the defendants, who were merchants in London, with directions to get it discounted, and apply the proceeds in a particular way. The defendants did not get it

Exception
Where bills of
exchange mis-
appropriated,
action for
money had
and received
no affirmation
of contract.
Buchanan v.
Findlay.

discounted, but received the money when it became due, which happened after the bankruptcy. Before the bankruptcy, the bankrupts had requested to have the bill returned to them. It was held that the defendants could not, in this action by the assignees, set off a debt due to them by the bankrupts.

Distinguished
in *Thorpe v.*
Thorpe.

This case was fully canvassed and explained in *Thorpe v. Thorpe, supra*. In that case, the defendant had received from the plaintiff a bill, indorsed and payable to plaintiff, for the purpose of being paid to W.; he had not paid it to W., but had received the money at the maturity of the bill; and the question was, whether, in an action for that money, he could plead a set-off. The court held that he might. "If," said Parke, J., "the plaintiff had chosen, instead of *assumpsit* for money had and received, to bring a special action for the breach of duty, there could have been no set-off, because it would have been an action for unliquidated damages." (See now, however, the Judicature Act, 1873, and R. S. C., 1883, O. XIX., r. 3). "But, by bringing *assumpsit* for money had and received, he lets in the consequences of that form of action, one of which is the right of set-off. The expressions of the court in *Buchanan v. Findlay* must be taken with reference to the subject-matter. In that case, the bills remained in the hands of the defendants, unapplied to the purpose for which they had been sent, when the parties who had sent them countermanded the order for their being discounted, and desired to have them returned, which was not done. It was not a case of mutual credit, because the transaction, on the part of the defendants, was against good faith. The assignees, in that case, did not affirm any contract by bringing an action for money had and received, which merely stood in the place of an action of trover."

Authorities in
support of
exception.

In accordance with this passage is the observation of Patteson, J., in *Groom v. West*, 8 A. & E. 758, 772. "If," said his lordship, "a party sends another bills to be applied to a specific purpose, the receiver cannot, by applying them to his own needs, alter that purpose, and make the trust a debt. That appears from *Buchanan v. Findlay*, and other cases." See also *Russell v. Bell*, 10 M. & W. 340.

So where
money mis-
applied.
Hill v. Smith.

In *Hill v. Smith*, 12 M. & W. 618, the same principle was applied, where a sum of money was paid by K. to a bank for the purpose of providing for particular bills. K. being then indebted to the bank in a larger amount, they placed the sum to the credit of his account with them, instead of

following his instructions as to its application. The bills were refused acceptance, and while they remained unpaid in the hands of the holder, K. became bankrupt: it was held that his assignees might recover *the whole amount* in a special action of *assumpsit* against the bank. "It was well argued," said Parke, B., in delivering the judgment of the court, "that if a bill of exchange had been delivered to the defendants to be handed over, and they had converted it to their own use, the assignees might have brought an action of trover, and recovered the full value of the bill at the time of the conversion; and that it made no real difference that money, not a bill, was misapplied." See also *Alder v. Keighley*, 15 M. & W. 117; *Colson v. Welsh*, 1 Esp. 379; and *Bell v. Carey*, 8 C. B. 887.

Brewer v. Sparrow, 7 B. & C. 310, and *Burn v. Morris*, 4 Tyr. 485, are also two cases *ejusdem generis*, in one of which the principle laid down in *Smith v. Hodson* was held applicable, while the other was considered distinguishable. In *Brewer v. Sparrow*, 7 B. & C. 310, the assignees of a bankrupt brought *trover* for chattels of the bankrupt, of which the defendant had taken possession. The chattels were part of the bankrupt's stock in trade, which, on the bankrupt's absconding, the defendant had taken possession of, and carried on the trade. He had, however, rendered to the assignees a fair account, and paid over the balance. "The defendant," said Bayley, J., "in the first instance, was a wrongdoer, and the plaintiffs might have treated him as such. But it was competent to them, in their character of assignees, either to treat him as a wrongdoer, and disaffirm his acts, or to affirm his acts, and treat him as their agent; and if they have once affirmed his acts, and treated him as their agent, they cannot afterwards treat him as a wrongdoer, nor can they affirm his acts in part and avoid them as to the rest. . . . By accepting and retaining the balance without objection, they adopted his acts, and recognised him as their agent, and, having so done, they are not at liberty to treat him as a wrongdoer." Judgment for defendant.

The above case was relied on as in point, but held distinguishable, in *Burn v. Morris*, 4 Tyr. 485. That was an action of trover, brought for a 20*l.* bank-note, lost by the plaintiff, found by a woman in the street, taken, at her request, by the defendant's son to the bank, and there changed by his father's directions, and the proceeds, *minus*

Brewer v. Sparrow. Election by assignees irrevocable.

Burn v. Morris. Receipt of part of proceeds held no affirmance.

2*l.*, given back to the woman. The woman was afterwards taken before the Lord Mayor, and 7*l.*, part of the proceeds, found on her, and given back to the plaintiff. After a verdict for 13*l.*, it was moved to enter a nonsuit, upon the ground that the receipt of the 7*l.* was an affirmance of the whole transaction. *Brewer v. Sparrow* was cited: but Lord Lyndhurst said: "In that case the whole proceeds of the sale were taken; that is an adoption of the act. Here the receipt of the 7*l.* does not ratify the act of the parties, but only goes in diminution of damages."

But this may amount to affirmance.

It is obvious that, in this case, to have construed the receipt by the plaintiff, of that part of the proceeds of the note which could be followed, as an adoption of the previous wrongful acts, would have been to give to the transaction a meaning which it did not really bear; the receipt, however, of a part only of the proceeds of the wrongful sale of goods *may* amount to an adoption of the act of selling, if this appears to have been the intention of the parties; see *Lythgoe v. Vernon*, 5 H. & N. 180, where the Court of Exch. held, upon demurrer, that the owner of goods who had, after a tortious sale, claimed the proceeds, and received *part of them*, could not afterwards treat the seller as a wrongdoer, and maintain trover against him. In this case *Brewer v. Sparrow* was cited, but not *Burn v. Morris*; see *Armstrong v. Allan*, 67 L. T. 738.

Instances of facts held not to amount to affirmance by assignees.

But where the purchasers of goods from a bankrupt, after notice of an act of bankruptcy, refused to pay for them upon a demand made by the assignees, who also sent to them an invoice of the goods; it was held that, the demand made by the assignees not having been complied with, their acts did not affirm the sale, and that they might recover the value of the goods in an action of trover; *Valpy v. Sanders*, 5 C. B. 886; see also *Morris v. Robinson*, 3 B. & C. 196.

Smith v. Baker.

The subject of this note was much considered in *Smith v. Baker*, L. R. 8 C. P. 350, where Bovill, C.J., said that "if an action for money had and received is brought, that is, in point of law, a conclusive election to waive the tort; and so the commencement of an action of trespass or trover is a conclusive election the other way. . . . But there is another class of cases in which an act is of an ambiguous character, and may or may not be done with the intention of adopting and affirming the wrongful act. In such cases the question whether the tort has been waived becomes rather a matter of fact than of law." In that case it was held that the

bankrupt's trustee, by getting a fraudulent bill of sale set aside by the Court of Bankruptcy and receiving from the defendant the proceeds of the goods comprised in it, which had been sold by the defendant, had precluded himself from suing in trover for the goods. The plaintiff's proceedings were either equivalent to an action for money had and received, or amounted in fact to an affirmance of the wrongful sale.

In *Roe v. Mutual Loan Fund*, 19 Q. B. D. 347, a bankrupt, who had given a bill of sale to the defendants, returned them as secured creditors; they sold the goods, and proved for the balance of their debt. The bankrupt obtained his discharge on payment of a composition to his creditors, including the defendants, and then sued them for wrongful seizure of the goods, alleging that the bill of sale was invalid. The C. A. held that the action must fail, approving of the rule stated in *Smith v. Baker*, *supra*, by Honyman, J., that a man "cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage."

Roe v. Mutual Loan Fund.

As to the right of the assignees of a bankrupt to disaffirm an execution against the bankrupt's goods fraudulently procured by himself, and as to the effect of such disaffirmance, see *Stevenson v. Newnham*, 13 C. B. 285.

Disaffirmance of fraudulent execution.

In *Powell v. Rees*, 7 A. & E. 426, Rees had before his death tortiously taken coal from the plaintiff's land; and it was held that, the coal having been sold before Rees' death, money had and received would lie against his administrator for the proceeds of the coal taken more than six months before that event, and trespass for the coal taken afterwards, under stat. 3 & 4 W. 4, c. 42, s. 2. This was, however, on the ground that the subject-matter of each action was distinct. The "intestate," said Lord Denman, "was guilty of a series of trespasses, and not of one single wrongful act. The plaintiffs, therefore, have only pursued different remedies for different injuries."

Where injury divisible, right to different remedies.

Powell v. Rees.

So, where in ejectment for alternative breaches, viz., permitting an auction upon the premises and non-payment of rent accruing due subsequently, the defendant paid the rent into court, and the plaintiff took it out in satisfaction, it was held that the acceptance of the rent under such circumstances

Toleman v. Portbury.

Waiver of forfeiture.

did not amount to a waiver by the plaintiff of his right to bring ejectment in respect of the alternative breach; *Toleman v. Portbury*, L. R. 7 Q. B. 344; and see the notes to *Dumpor's Case*, ante, vol. i., pp. 36—45, as to waiver of forfeiture.

Waiver of trespass to money.

Where the defendants had wrongfully taken possession of the money of the plaintiff, and paid the amount into a bank in their joint names, it was held that the plaintiff might waive the trespass and recover the amount as money had and received; *Neate v. Harding*, 6 Exch. 349. As to the right to waive the trespass where there has been a wrongful entry on land, and to sue for use and occupation, see *Turner v. Cameron's Co.*, 5 Exch. 932, and the notes to *Keech v. Hall*, ante, vol. i., p. 513.

To land.

Demand and refusal necessary if action brought in trover.

Where the tort is not waived, but an action is brought by the bankrupt's trustee for the conversion of the goods, as it was suggested in the principal case might have been done, there must be an avoidance of the contract by the trustee, and therefore a demand and refusal are necessary before action brought. But this is not so where the tort is waived and an action brought for the proceeds of the conversion; *Heilbut v. Nevill*, L. R. 5 C. P. 478. That the bankrupt's trustee has the right to bring such an action, see *Marks v. Feldman*, L. R. 4 Q. B. 481.

Secus, where action is for proceeds.

DOVASTON v. PAYNE.

35 G. 3, C. P.

[REPORTED 2 H. BL. 527 (3 R. R. 497).]

The property of a highway is in the owner of the soil, subject to an easement (*a*) for the benefit of the public. Therefore, a plea, in bar of an avowry for taking cattle damage feasant, that the cattle escaped from a public highway into the *locus in quo*, through the defect of fences, must show that they were *passing on the highway* when they escaped: it is not sufficient to state that being in the highway they escaped.

REPLEVIN for taking the cattle of the plaintiff. Avowry that the defendant was seised in fee of the *locus in quo*, and took the cattle damage feasant. Plea, that the *locus in quo* "lay contiguous and next adjoining to a certain common and public king's highway, and that the defendant, and all other owners, tenants, and occupiers of the said place in which, &c., with the appurtenances, for the time being, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and the said defendant still of right ought to repair and amend the hedges and fences between the said place in which, &c., and the said highway, when and so often as need or occasion hath been or required, or shall or may be or require, to prevent cattle *being in the said highway* from erring and escaping thereout into the said place in which, &c., through the defects and defaults of the said hedges and fences, and doing damage there. And because the said hedges and fences between the said place in which, &c., and the said highway, before and at the time when, &c., were ruinous, broken down, prostrated, and in great decay for want of needful and necessary repairing and amending thereof, the said cattle in the said declaration mentioned, just before the said time when, &c., *being in the said highway*, erred and escaped thereout, into the said place in which, &c., through the defects and defaults,

(*a*) Not, strictly speaking, an *easement*; see *post*, p. 161.

&c., &c.” To this plea there was a special demurrer, “For that it is not shown in or by the said plea, that the said cattle, before the said time when, &c., when they escaped out of the said highway into the said place in which, &c., *were passing through and along the said highway*, nor that they had any right to be there at all, &c.”

In support of the demurrer, *Williams*, Serjt. argued as follows: It is a rule in pleading that if the defendant admits the fact complained of he must show some good reason for or justification of it. If the cattle in this case had escaped from an adjoining close through the default of the plaintiff's fences, the defendant must have shown that he had an interest in that close, or a licence from the owner to put his cattle there; *Dyer*, 365 *a*, *Sir F. Leke's Case*, recognised *Hob.* 104, *Digby v. Fitzherbert*; for a man is bound to repair against those who have right, but not against those who have no right. So, if cattle escape from a highway, the party justifying a trespass must show they were lawfully using the highway, that is, were passing and re-passing on it, which is material and traversable. It is not sufficient that they were simply in it, the *being* there is equivocal and not traversable. The owner of the soil may have trespass, if the cattle do anything but merely pass and repass; *Bro. Abr. Tresp.* pl. 321; and, according to this principle, the entries state, in pleas of this kind, that the cattle were *super viam prædictam transeuntes*; *Thomp. Entr.* 296, 297; and in *Herne's Plead.* 822, that they were “*driven along the highway.*”

Heywood, Serjt. *contra*.—The same strictness is not required in a plea in bar to an avowry in replevin, as in a justification in trespass. Here the plaintiff pleads the plea, and it is sufficient for him to show that his cattle were wrongfully taken. The *passing* on the highway is as uncertain as the *being* there, and as little traversable. But the material issues on the record would be, whether the fences were out of repair, and whether the defendant was bound to repair them. If he were, it is immaterial whether the cattle were passing on the highway or not. In a plea in bar, certainty to a common intent is sufficient. It may therefore be intended that the cattle were lawfully in the highway.

Lord C. J. EYRE.—I agree with my brother *Williams* as to the general law that the party who would take advantage of

fences being out of repair, as an excuse for his cattle escaping from a way into the land of another, must show that he was lawfully using the easement when the cattle so escaped. This therefore reduces the case to a single point, namely, Whether it does not appear on the plea, to a *common intent*, that the cattle were on the highway using it in such a manner as the owner had a right to do, from the words "*being in the said highway?*" This is a different case from cattle escaping from a close, where it is necessary to show that the owner had a right to put them there, because a highway being for the use of the public, cattle may be in the highway of common right; I doubt, therefore, whether it requires a more particular statement. It would certainly have been more formal to have said that the cattle were passing and repassing; and if the evidence had proved that they were grazing on the way, though the issue would have been literally, it would not have been substantially, proved. But I doubt whether the being in the highway might not have been traversed; and if the *being in the highway* can be construed to be certain to a common intent, the plea may be supported, notwithstanding there is a special demurrer, for a special demurrer does not reach a mere literal expression. The precedents indeed seem to make it necessary to state that the cattle were passing and repassing, but they are but few; yet upon the whole I rather think the objection a good one, because those forms of pleading are as cited by my brother Williams.

BULLER, J.—This is so plain a case that it is difficult to make it a ground of argument. But my brother Heywood says there is a difference between trespass and replevin in the rules of pleading. In some cases there is certainly a material difference in the pleading in the two actions, though in others they are the same. One of the cases in which they differ is, that, if trespass be brought for taking cattle which were distrained damage feasant, it is sufficient for the defendant to say that he was possessed of the close, and the cattle were doing damage; but in replevin the avowant must deduce a title to the close. Wherever there is a difference, it is in favour of trespass and against replevin: for in trespass an excuse in a plea is sufficient, but in an avowry a title must be shown (*a*). This brings me to the

(*a*) See the note to *Mellor v. Spate-* *Poole v. Longueville*, 2 Wms. Saund.
man, 1 Wms. Saund. 346 e, and to 284 e.

(BULLER, J.)

question, Whether the plea on this record be good to a common intent? Now I think that the doctrine of certainty to a common intent will not support it. Certainty in pleading has been stated by Lord Coke (*b*) to be of three sorts, viz. certainty to a common intent, to a certain intent in general, and to a certain intent in every particular. I remember to have heard Mr. Justice Aston treat these distinctions as a jargon of words, without meaning. They have, however, long been made, and ought not altogether to be departed from. Concerning the last two kinds of certainty, it is not necessary to say anything at present. But it should be remembered that the certain intent in every particular applies only to the case of estoppels (*b*). By a *common intent* I understand that when words are used *which will bear a natural sense*, and also *an artificial one*, or one to be made out by argument or inference, the *natural sense shall prevail*: it is simply a rule of *construction*, and *not of addition*: common intent cannot add to a sentence words which are omitted. There is also another rule in pleading, which is, that if the meaning of words be equivocal, they shall be taken most strongly against the party pleading them. There can be no doubt that the passing and repassing on the highway was traversable: for the question, Whether the plaintiff was a trespasser or not? depends on the fact, whether he was passing and repassing, and using the road as a highway, or whether his cattle were in the road as trespassers; and that which is the gist of the defence must necessarily be traversable. A most material point, therefore, is omitted, and I think the plea would be bad on a general demurrer. But here there is a special demurrer, and as the words are equivocal they are informal.

HEATH, J.—The law is, as my brother Williams stated, that if cattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. If it be a close, the owner of cattle must show an interest or a right to put them there. If it be a way, he must show that he was lawfully using the way; *for the property is in the owner of the soil, subject to an easement* (*c*) *for*

(*b*) Co. Litt. 303.

(*c*) Not, strictly speaking, an *easement*; see *post*, p. 161.

the benefit of the public. On this plea it does not appear whether the cattle were passing and repassing, or whether they were trespassing on the highway; the words used are entirely equivocal.

ROOKE, J., of the same opinion.

Judgment for the defendant.

It is intended to append to this case a few remarks upon the branch of law, with reference to which it is usually cited; namely, the respective rights of the public, and of the owners of the soil, over a common highway. The questions on which it is intended to touch are—

Questions discussed in this note.

I. What is a highway.

II. How it originates.

III. How it may be lost.

IV. By whom it is to be kept in repair.

I. *Highway.—What.*—A *highway* is a passage which is open to all the king's subjects. Mr. Wellbeloved defined it to be a *thoroughfare*; and at one time there were doubts whether there could be a highway where there had never been a thoroughfare; though it seemed that a highway did not cease to be such upon one of its ends being stopped up; *per* Patteson, J., *R. v. Downshire*, 4 A. & E. 713. It was always clear that every passage open *de jure* to all the king's subjects must be a highway; and it is now settled that there may be a highway where no thoroughfare ever existed; *Bateman v. Bluck*, 18 Q. B. 870; *Rugby Charity v. Merryweather*, 11 East, 375, n.; *Souch v. E. London R. Co.*, 16 Eq. 108; *Vernon v. St. James, W.*, 16 Ch. D. 449. Though called "an easement for the benefit of the public" by Heath, J., in the leading case (*supra*, p. 160), it is not, strictly speaking, an *easement*; see *per* Lord Cairns, *Rangleley v. Mid. R. Co.*, 3 Ch. 306, 310; *per* Lord Coleridge, *Hawkins v. Rutter*, (1892) 1 Q. B. 668.

1. What is a highway.

Need not be thoroughfare

Not strictly an easement.

It may be a *foot way*, appropriated to the sole use of pedestrians; a *pack* and *prime way*, which is both a horse and foot way; or a *cart way*, which comprehends the other two, and also a cart or carriage way; Co. Lit. 56 a; but, to whichever of these classes it belong, it is still a *highway*: for "*highway* is the *genus* of all public ways, as well cart, horse, and foot ways;" *per* Lord Holt, *R. v. Saintiff*, 6

Highway, the *genus* of all public ways.

Mod. 255; see *Logan v. Burton*, 5 B. & C. 513; *Allen v. Ormond*, 8 East, 4; *R. v. Salop*, 13 East, 95; *R. v. Cluworth*, 1 Salk. 359. As to railroads, see *R. v. Severn & Wye R. Co.*, 2 B. & Ald. 646.

Public rivers
are highways.

Even *public rivers* are, in law, to be considered *highways*, since they fall within the definition above given, and are passages open to all the king's subjects; *R. v. Hammond*, 10 Mod. 382; Com. Dig., *Chimin*, A. 1; *Lynn v. Turner*, 1 Cowp. 86; *R. v. Grosvenor*, 2 Stark. 511; *Colchester v. Brooke*, 7 Q. B. 339; *Dimes v. Petley*, 15 Id. 276. See also *post*, p. 181.

Soil and free-
hold of high-
way generally
vested in a
private owner.

The interest of the public in a highway consisting solely in the right of passage, the soil and freehold over which that right is exercised may be, and generally is, vested in a private owner, who may maintain an action against persons who infringe his rights therein, as, for instance, by permitting cattle to depasture there; see the principal case; *Lade v. Shepherd*, 2 Str. 1004; and *Stevens v. Whistler*, 11 East, 51.

The rule that the interest of the public in a highway consists solely in the right of passage is well illustrated by the cases of *R. v. Pratt* and *Harrison v. Rutland*.

R. v. Pratt.

In *R. v. Pratt*, 4 E. & B. 860, Pratt was convicted, under 1 & 2 Will. 4, c. 32, s. 30, of trespassing in search of game upon land in the occupation of B.; and on appeal to sessions a case was stated for the opinion of the court. The facts were these: Pratt went, with gun and dog, on to a public road, the soil of which, as well as the land on either side, belonged to B.; and, having sent the dog into an adjacent cover in the occupation of B., he stood on the road and fired at a pheasant which flew across. The conviction was upheld. "On these facts," said Lord Campbell, "I think that the magistrates were perfectly justified in concluding that Pratt was trespassing on land in the occupation of B. in search of game. He was beyond all controversy on land, the soil and freehold of which was in the owner of the adjoining land, that is B. It is true that the public had a right of way there; but, subject to that right, the soil, and every right incident to the ownership of the soil, was in B. The road, therefore, must be considered as B.'s land. Then Pratt, being on that land, was undoubtedly a trespasser if he went there, not in exercise of the right of way, but for the purpose of seeking game, and that only. If he did go there for that purpose only, he

committed the offence named in the Act; he trespassed by being on the land in pursuit of game."

In *Harrison v. Rutland*, (1893) 1 Q. B. 142, the defendant owned a moor crossed by a highway, the soil of which was vested in him; while he was shooting on the moor, the plaintiff came upon the highway for the purpose of interfering with the sport, and, being there, wilfully and deliberately did so; the keepers forcibly held him down. In an action for assault, the defendant justified on the ground that the plaintiff was a trespasser. At the trial Lord Coleridge ruled that he was not a trespasser; but the C. A. held that he was so, as he was upon the highway for purposes other than its use as such. Lord Esher's judgment shows the modern tendency not to limit too closely the public rights. He said: "Highways are no doubt dedicated, *primâ facie*, for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think he will be a trespasser."

*Harrison v.
Rutland.*

As the interest of the public is limited to the right of passage, the owner of the soil may use it for his own purposes in any manner not inconsistent with this right; *St. Mary, Newington v. Jacobs*, L. R. 7 Q. B. 47. It must be remembered, however, that the public right extends over the whole width of the highway, and not merely over the *via trita*; *Fowler v. Sanders*, Cro. Jac. 446; *R. v. U. K. Electric Telegraph Co.*, 31 L. J. M. C. 166; *Turner v. Ringwood*, 9 Eq. 418; *Pullin v. Deffel*, 64 L. T. 134.

In *Souch v. E. London R. Co.*, 16 Eq. 108, Malins, V.-C., seems to have thought that railway companies have the right to tunnel under streets and other highways without compensating the owner of the sub-soil; but this right, it is apprehended, they could acquire only by statute. In a subsequent proceeding in the same case, 22 W. R. 566, Bacon, V.-C., apparently differed from Malins, V.-C., for, after holding that the subsoil belonged to the plaintiff, and not to the board of works or the vestry, he directed an account to be taken of the compensation to be paid by the company. See *Ramsden v. Manchester, &c., R. Co.*, 1 Exch. 723; and compare *Goodson v. Richardson*, 9 Ch. 221, where an injunction was granted to restrain the continuance of water-pipes, which had, without the consent of the owner of the soil, been laid in the soil of a highway.

Right to
tunnel
beneath a
highway.

General presumption of law as to ownership.

The general *primâ facie* presumption of law is, that the freehold of the road, *usque ad medium filium viæ*, is in the proprietors of the land on either side; *Cooke v. Green*, 11 Price, 736; *Headlam v. Hedley*, Holt, N. P. 463; *Haigh v. West*, (1893) 2 Q. B. 19, 29; see, however, the exception stated by Lord Denman, *R. v. Hatfield*, 4 A. & E. 164, and Lord Tenterden, *R. v. Edmonton*, 1 M. & Rob. 24.

Applies to private as well as public roads.

This presumption applies as well to private as to public roads. "This presumption," said Cockburn, C.J., in *Holmes v. Bellingham*, 7 C. B. N. S. 329, "is allowed to prevail upon grounds of public convenience, and to prevent disputes as to the precise boundaries of property; and it is based upon this supposition,—which may be more or less founded in fact, but which at all events has been adopted,—that, when the road was originally formed, the proprietors on either side each contributed a portion of his land for the purpose. I think that is an equally convenient and reasonable principle, whether applied to a public or to a private road, but in the latter case it must of course be taken with this qualification, that the user of it has been *quâ road*, and not in the exercise of a claim of ownership."

May be rebutted.

The presumption may, however, be rebutted; see *Beckett v. Leeds*, 7 Ch. 421, where James, L.J., said: "I should myself, if it were necessary to determine it, be very slow to come to the conclusion that where there is a road going through an estate, and a site is granted by the roadside for the erection of a cottage or house, and a cottage or house is built upon that site, the mere conveyance, or grant, or demise of a piece of land as a site of and for the purpose of building a house is, in presumption of law, a grant to the middle of the high-road, the frontage of which is probably the origin of the house being built on that space;" see also *Salisbury v. G. N. R. Co.*, 5 C. B. N. S. 174, as to what provisions in local turnpike acts are sufficient to rebut the presumption, and *Landrock v. Metr. D. R. Co.*, W. N. 1886, 195. The presumption may be rebutted by evidence of the circumstances under which the grant was made; *Devonshire v. Pattinson*, 20 Q. B. D. 263; *Pryor v. Petre*, (1894) 2 Ch. 11. The presumption of a grant *usque ad medium filum viæ* does not exist where the parcel conveyed is described as bounded by an intended highway which has never in fact been dedicated; *Leigh v. Jack*, 5 Ex. D. 264.

So of waste land on each side of road.

So likewise the waste land on each side of the road is presumed to belong to the adjoining owners; *Steel v. Pric-*

kett, 2 Stark. 463; *Doe v. Pearsey*, 7 B. & C. 304; *Tutill v. West Ham*, L. R. 8 C. P. 447; unless, indeed, it communicate with other larger wastes belonging to the lord of the manor; *Anon. Lofft*, 358; *Grose v. West*, 7 Taunt. 39; *Doe v. Kemp*, 7 Bing. 332; see *Gery v. Redman*, 1 Q. B. D. 161.

A title to the soil of a highway can be gained under the Statute of Limitations; *Haigh v. West*, (1893) 2 Q. B. 19, where, the parish vestry having during over 200 years annually let out the pasturage on the road, the churchwardens and overseers were held to be owners in trust for the parish; *Bevan v. London Portland Cement Co.*, 67 L. T. 615, where the title was acquired by occupation of an underground tunnel.

The effect of the Public Health Act, 1875, ss. 4 and 149, is to vest the soil of any "street" within the Act, being a highway repairable by the inhabitants at large, in the urban authority, so far as is necessary for its use as a highway and for the purposes of the Act. The authority may let any pasturage upon the highway; *Coverdale v. Charlton*, 4 Q. B. D. 104; and may put up poles and over-head wires for the purpose of electric light; *Fareham L. B. v. Smith*, W. N. 1891, 76; but, apart from what is necessary or proper for the user and maintenance or support of the street as such, it has no general proprietary rights in the air above; *Wandsworth v. United Telephone Co.*, 13 Q. B. D. 904; or in the ground below; *Baird v. Tunbridge Wells*, (1894) 2 Q. B. 867; see *A.-G. v. Conduit Co.*, (1895) 1 Q. B. 301. The authority's interest in the soil ceases on the extinction of the highway; *Rolls v. St. George the Martyr, Southwark*, 14 Ch. D. 785.

Soil of
"street"
under Public
Health Act.

Not only may the soil over which the highway passes be vested in an individual, but it may be subject to a private right of way co-existent with the public one; *Brownlow v. Tomlinson*, 1 M. & Gr. 484; or to a custom of partial interruption for a limited time by the erection of booths during a fair; *Elwood v. Bullock*, 6 Q. B. 383.

Soil of high-
way may be
subject to
other rights

The right of the public, however, is that which is of chief importance, and is principally to be taken care of; and therefore if a highway becomes so out of repair and founderaus, as to be impassable, or even incommodious, the public have a right to go on the adjacent ground, whether it be cultivated or uncultivated; 1 Rolle's Abr. 390 A. pl. 1, B. pl. 1; 1 Hawk. P. C. 76, s. 2; *Young v. ———*, 1 Ld. Raym. 725; *Absor v. French*, 2 Show. 28, pl. 19; *Taylor v. Whitehead*, 2 Dougl. 745; 2 Wms. Saund. 161, n. (12); a privilege

Right of
public to go
on land adja-
cent to high-
way when
founderaus.

which the grantee of a private way can under no circumstances assume; *Pomfret v. Ricroft*, 1 Wms. Saund. 322 a, n. 3; *Taylor v. Whitehead*, *supra*; *Bullard v. Harrison*, 4 M. & S. 387.

Even as to the case of a public way doubts were expressed in *Arnold v. Holbrook*, L. R. 8 Q. B. 96, where it was held that the defendant had no right to deviate from a public footway which had been ploughed up, the dedication being limited by the right of the owner so to plough it up; see also the remarks in *Spearman on Highways*, p. 47.

When way
obstructed by
grantor.

There is, however, an obvious distinction between allowing a private way to become founderaus and actually obstructing it. Hence if A. grants a right of way over his field to B., and then places across the way an obstruction not allowing of easy removal, B. is entitled, as against A., to go round the obstacle; *Selby v. Nettlefold*, 9 Ch. 111.

When ob-
structed by
wrong-doer.

Whether this right of going on the adjacent land exists in cases in which the highway is obstructed by a wrong-doer was considered in *Daves v. Hawkins*, 8 C. B. N. S. 848. Williams, J., observed that it is remarkable that in the text-books this right is confined to cases in which the highway is founderaus and out of repair; and that on principle it may be doubted whether the burthen to which the adjacent soil is subjected when the parish has been guilty of a non-feasance in neglecting to keep the highway in repair, ought to be likewise inflicted because some wrong-doer has put an obstruction on the highway, which may be abated as a nuisance by any one who has occasion to use the road; at all events, unless the obstruction be of such a nature that practically it cannot be abated, and so the road is in effect impassable. Erle, C.J., said, however, that he knew of no decision and no principle making a distinction between a road impassable by non-feasance, that is, neglect of repair, and a road impassable by mis-feasance, that is, by ditch and bank wilfully made; and Williams, J., added, that in *Absor v. French*, *supra*, which is very shortly and obscurely reported in 2 Show. 28, it seems to have been held a good plea to an action of trespass that *the plaintiff himself* had stopped a highway so that the defendant could not pass, and therefore he went over *the plaintiff's close*, doing as little harm as he could.

An owner of lands adjoining a highway is entitled to access to the highway at all points where his land adjoins the highway, whether or no the soil of the highway be his; *Ramuz v. Southend* L. B., 67 L. T. 169.

II. *As to the mode in which a highway is created.*—Except where it is expressly created by statute, a highway derives its existence from a dedication to the public by the owner of land of a right of passage over it. This dedication, though it be not made in express terms, as it indeed seldom is, may and will be presumed from an uninterrupted use by the public of the right of way claimed; *R. v. Lloyd*, 1 Camp. 260; *British Museum v. Finnis*, 5 C. & P. 460; *Grand Surrey Canal Co. v. Hall*, 1 M. & Gr. 392; *Eyre v. New Forest H. B.*, 56 J. P. 517; see *Robinson v. Cowpen*, 63 L. J. Q. B. 235. An open user as of right by the public raises a presumptive inference of dedication; and when such user is proved, the onus lies on the person denying that inference to rebut it; *e.g.*, by showing that, owing to the state of the title, there was no valid dedication; *R. v. Petrie*, 4 E. & B. 737.

2. How highway may be created.

Dedication of highway presumed from user by public.

“No particular time is necessary for evidence of a dedication. . . . If the act of dedication be unequivocal, it may take place immediately. For instance, if a man builds a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is *instantly* a highway;” *per* Chambre, J., in *Woodyer v. Hadden*, 5 Taunt. 125.

No particular time necessary for dedication.

Six years have been held time enough wherein to presume a dedication from *user*; *Rugby Charity v. Merryweather*, 11 East, 376; four years too short a time; *R. v. Hudson*, 2 Str. 909; eighteen months, again, sufficient where there had been an express intention to dedicate; *N. London R. Co. v. St. Mary, Islington*, 21 W. R. 226. All depends upon the special circumstances of each case, as will be understood from the above remarks of Chambre, J.; and the duration of the public *user*, which limits the rights of the owner of the soil, is not so important as the nature of the acts done by the owner of the soil, and of the adverse acts acquiesced in by him, and the intention thereby indicated; see *R. v. Chorley*, 12 Q. B. 515; *N. London R. Co. v. St. Mary, Islington*, *supra*.

In *Dawes v. Hawkins*, 8 C. B. N. S. 848, already cited, a long public user of a line of road, substituted for an ancient highway which continued for the same period wrongfully obstructed, was held to be referable to the right of the public to deviate on the adjoining land when the owner of the soil illegally stops up the highway, or suffers it to become foundrous, and therefore not to afford evidence of

Dawes v. Hawkins.

dedication of the substituted way. From this view, however, Williams, J., dissented, being of opinion that, as the owner of the soil over which the public had passed had for many years submitted to this burthen, instead of causing the obstruction on the ancient highway to be removed, this afforded *some* evidence of an intention to dedicate the substituted way.

Rights of the
Crown.

A dedication can be presumed against the Crown. "The presumption of dedication may be made where the land belongs to the Crown as it may be where the land belongs to a private person;" *Turner v. Walsh*, 6 App. Cas. 636; *R. v. East Mark*, 11 Q. B. 877. The decision in *Harper v. Charlesworth*, 4 B. & C. 574, was merely that the Crown's tenant cannot dedicate, as against the Crown.

Rights of
reversioners.

Dedication by a lessee or owner of a particular estate will not bind the reversioner or remainderman, or prevent him from stopping the way dedicated when the estate comes into his possession; *Wood v. Veal*, 5 B. & Ald. 454; *Baxter v. Taylor*, 1 N. & M. 13; *R. v. Edmonton*, 1 M. & Rob. 24; *Eyre v. New Forest H. B.*, 56 J. P. 517; unless, indeed, there is some evidence that the owner in fee consented to the dedication; *Harper v. Charlesworth*, 4 B. & C. 574, 591. His consent may be presumed where there has been a succession of tenants, and he has known of the public user; *R. v. Barr*, 4 Camp. 16.

Powers of
public bodies.

Corporations and public bodies may dedicate, provided that the dedication be not inconsistent with the purposes for which the land is vested in them; *R. v. Leake*, 5 B. & Ad. 469; *Grand Surrey Canal Co. v. Hall*, 1 M. & Gr. 392; *Greenwich B. W. v. Maudslay*, L. R. 5 Q. B. 397; *Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273.

Presumption
of dedication
may be
rebutted.

As a dedication will be presumed where circumstances warrant it, so that presumption may be rebutted by circumstances incompatible with the supposition that any dedication has taken place. Thus, though we have seen that, if a man open a useful passage from one highway into another, a presumption in course of time arises, that he has dedicated that passage to the public; yet, if he place a bar or gate across the road, which may be opened and shut at pleasure, the presumption is rebutted. Nay, though the bar or gate be knocked down, the fact of its having once been there will, at least for a considerable time, prevent the presumption of a dedication from arising; *Roberts v. Karr*, and *Lethbridge v. Winter*, 1 Camp. 262, n.; see *British Museum v. Finnis*, 5 C. & P. 460; *Davies v. Stephens*, 7 Id. 570. So too it

may be proved that the *user* took place under an agreement, since determined; *R. v. Hudson*, 2 Str. 909; *Barraclough v. Johnson*, 8 A. & E. 99; see *Grand Surrey Canal Co. v. Hall*, 1 M. & Gr. 392; *Ferrand v. Milligan*, 7 Q. B. 730; *Healey v. Batley*, 19 Eq. 375. In *R. v. Thomas*, 7 E. & B. 399, the fact that a road, which had been originally made by turnpike trustees under a temporary Act, as part of the line of road thereby authorized, had been used by the public and repaired by the parish, both before and after the Act expired, was held evidence of a dedication; for the owner of the land taken for the road might have resumed it when the Act expired (see *R. v. Mellor*, 1 B. & Ad. 32), and a dedication could be presumed from his allowing its use by the public to continue.

A dedication to the public may be in some respects limited or qualified, provided that the limitation or qualification be imposed contemporaneously with the dedication. Thus, it may be limited *as to the times when it may be used*—e.g., a public bridge may be useable by the public only at times when the river is not safely fordable; *R. v. Northampton*, 2 M. & S. 262. How far it may be limited *as to the purposes for which it may be used* is a question of some difficulty. The purpose is more limited in case of a “footway” or “packway,” than in case of a “cartway;” but the question is whether other limits can be imposed; see *Roberts v. Karr*, 1 Camp. 262; *R. v. Leake*, 5 B. & Ad. 469. In *Stafford v. Coyney*, 7 B. & C. 257, the court, without deciding that there could be a dedication for all purposes except the cartage of coals, held that, if such partial dedication was bad, there was only a revocable licence to use the road and no dedication at all; but Bayley and Holroyd, JJ., thought that there could be such a partial dedication. A dedication cannot be limited *to a portion of the public*—e.g., to a parish; such a dedication is merely void, and does not operate in favour of the *whole* public; *Poole v. Huskinson*, 11 M. & W. 827. It seems clear, however, from *Poynton v. Wilson*, 2 Lutw. 1506, (not cited in *Poole v. Huskinson*), and Co. Lit. 110 b, 56 a, that a parish may have a right of way by custom; and under the Local Government Act, 1894, s. 8 (g), a parish council may now acquire by agreement a right of way for the parish. A dedication *subject to payment of toll*, not authorized by statute, is no dedication; *Austerberry v. Oldham*, 29 Ch. D. 750.

Limited or
qualified
dedications.

There may be a dedication of a footway to the public,

subject to the reservation by the owner of the *right to plough* it up periodically, which limit to the dedication may be proved by user; *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Arnold v. Blaker*, 6 Id. 433.

A highway may be dedicated to the public, subject to a pre-existing right of user by the owners of the adjoining lands for the purpose of depositing goods on it; so, it may be dedicated with an obstruction on it, or excavation in it, or near it, which is a hindrance, and dangerous to passengers, and which if placed or made on or near the highway after its dedication would have been a nuisance; and no action will lie against the person dedicating in respect of any injury caused thereby; *Le Neve v. Mile End Old Town*, 8 E. & B. 1054; *Morant v. Chamberlin*, 6 H. & N. 541; *Fisher v. Prowse*, 2 B. & S. 770; *Robbins v. Jones*, 15 C. B. N. S. 221; *Warner v. Wandsworth B. W.*, 53 J. P. 471.

*Fisher v.
Prowse.*

The law on this subject is laid down by Blackburn, J., in *Fisher v. Prowse*, in the following terms, afterwards adopted in *Robbins v. Jones*:—"The law is clear that if, after a highway exists, anything be newly made so near to it as to be dangerous to those using the highway—such, for instance, as an excavation (*Barnes v. Ward*, 9 C. B. 392), this will be unlawful and a nuisance: as it also is if an ancient erection, as a house, is suffered to become ruinous, so as to be dangerous (*R. v. Watts*, 1 Salk. 357); and those who make or maintain the nuisance in either case are liable for any damage sustained thereby, just as much as if the nuisance arose from an obstruction in the highway itself; but the question still remains whether an erection or excavation already existing and not otherwise unlawful, becomes unlawful when the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether, on the contrary, the dedication must not be taken to be made to the public, and accepted by them, subject to the inconvenience or risk arising from the existing state of things. We think the latter is the correct view of the law. It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations,

and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred.

“ On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights have been acquired by mere user. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired ; it would be doubly so if the consequence were that he was bound to fill up or fence off his canal.”

The assent of the *parish* through which the highway runs is not requisite at common law to give effect to the dedication ; *R. v. Leake*, 5 B. & Ad. 469 ; though the contrary of this proposition was once contended for, on account of the parish's common law liability to repair ; see *R. v. St. Benedict*, 4 B. & Ald. 447 ; *R. v. Mellor*, 1 B. & Ad. 32 ; *R. v. Cumberworth*, 3 Id. 108 ; *R. v. Wright*, Id. 681 ; but it is necessary for the *public* to assent in order that a way may become public ; and user by the public is evidence of its assent ; *per Brett, J., Cubitt v. Maxse*, L. R. 8 C. P. 704. It must be observed that 5 & 6 W. 4, c. 50, s. 23, does not curtail the power to dedicate highways, but only prevents the liability of the parish to repair from arising until assent has been given as prescribed.

Assent of parish not necessary.

Assent of public necessary.

Statutory Highways.—It has been already remarked, that a highway is sometimes created by statute. As soon as the requirements of the statute have been sufficiently complied with, the road becomes “ a common Queen's highway,” and may be so described in indictments ; and it remains a highway, so long as the statute is in force. It is immaterial whether the statute is permanent or temporary ; or whether or no it imposes or authorizes tolls ; *R. v. Lordsmere*, 15 Q. B. 689. The requirements are sufficiently complied with, if the road has been in fact opened to and used by the public for a considerable time ; Id. ; and not the less so, because the road, so opened and used, forms only part

Statutory highway.

of a system of roads, authorized by the statute, but never completed; *R. v. French*, 4 Q. B. D. 507, overruling *R. v. Cumberworth*, 3 B. & Ad. 108, and 4 A. & E. 731; *R. v. Edge Lane*, Id. 723. The fact, however, that the public has never used the road, and that the road was never completed in accordance with the statute, will prevent it from being a highway; *Cubitt v. Maxse*, L. R. 8 C. P. 704. Though the statute has ceased to be in force, the road may nevertheless be a highway, owing to the continuance of the public user; *R. v. Thomas*, 7 E. & B. 399, *supra*, p. 169.

3. How highway may be lost.

At common law may be diverted, not extinguished.

III. *As to the mode in which a highway may be lost.*—At common law a public right of way can never be lost absolutely; *Fowler v. Sanders*, Cro. Jac. 446. The general rule is thus laid down by Byles, J., in *Dawes v. Hawkins*, 8 C. B. N. S. 858: "It is an established maxim—once a highway always a highway; for the public cannot release their rights, and there is no extinctive presumption or prescription. The only methods of legally stopping a highway, are either by the old writ of *ad quod damnum*, or by proceedings before magistrates under the statute." It might, however, be diverted from one line of road into another; either by the Act of God, as if a navigable river change its course; see *R. v. Bamber*, 5 Q. B. 279; *R. v. Paul*, 2 M. & Rob. 307; *R. v. Hornsea*, 23 L. J. M. C. 59; or by proceedings on the writ *ad quod damnum*, which was an original writ, issuing out of Chancery, directing the sheriff to summon a jury to inquire whether the proposed diversion would be detrimental to the public, and to return the inquiry into Chancery, where any person thereby injured might impeach it. The destruction of the land over which a highway passes, *e.g.*, by the sea or by landslips, may, in effect, destroy the highway, if and so long as passage is not in any way possible; see *R. v. Bamber*, *R. v. Paul*, *R. v. Hornsea*, *supra*; and *R. v. Greenhow*, 1 Q. B. D. 703. A public right of way is not extinguished by non-user; *Turner v. Ringwood H. B.*, 9 Eq. 418, where it was held that the right of the public to use the whole width of the highway was not lost by trees having been allowed for 25 years to grow on the roadside and obstruct the passage there. Where, however, access to a highway has become impossible, because the ways leading to it have been legally stopped up, the highway is lost; *Bailey v. Jamieson*, 1 C. P. D. 329; see also *Gwynne v. Drewitt*, (1894) 2 Ch. 616.

Extinction or

A highway may, of course, be either extinguished or

diverted by statute. The Highway Act, 1835, ss. 84-92, provided a mode for stopping up or diverting highways, the prescribed procedure being as follows:—

diversion by
statute.
5 & 6 W. 4,
c. 50, ss.
84-92.

If the inhabitants in vestry assembled deem it expedient that a highway “should be stopped up, diverted or turned,” either entirely or with the reservation of a footway or bridleway, their chairman must in writing direct the surveyor to apply to two justices to view it and authorize him to pay all expenses. Any inhabitant may require the churchwardens to call a vestry for the purpose; *R. v. Maule*, 41 L. J. M. C. 47; and, under the Act, if any individual wishes to stop up, divert, or turn a highway, he can by writing require the surveyor to give notice to the churchwardens to call a vestry, and if the vestry agree to his proposal, the surveyor must apply to the two justices, the individual bearing all expenses.

If it appears to the justices upon their view (which must be personal; *R. v. Wallace*, 4 Q. B. D. 641; and joint; *R. v. Cambridgeshire*, 4 A. & E. 111), that the highway is unnecessary, or that the proposed new highway is nearer or more commodious to the public, and the owner of the land over which the new highway is intended to be made consents in writing, then notices must be posted “at the place and by the side of each end of the highway from whence the same is proposed to be diverted, and turned or stopped up” (see *R. v. Surrey*, L. R. 5 Q. B. 466; *R. v. Surrey*, (1892) 1 Q. B. 867); and must be advertized; and posted on the church-door of every parish in which the highway lies (see *R. v. Surrey*, (1892) 1 Q. B. 633). The justices, when the publication of the notices has been proved to their satisfaction, and a plan of the old and proposed new highways has been delivered to them, must make their certificate, containing all the required particulars. This must be lodged with the clerk of the peace, and be read by him in open court at the quarter sessions held next after four weeks from the day of its being so lodged, and then be enrolled, with the other documents, among the records. The stoppage or diversion of several highways connected together may be effected by the same order or certificate.

Any person aggrieved by the certificate may appeal to the said quarter sessions, giving fourteen days’ notice to the surveyor (see 12 & 13 Vict. c. 45, s. 1; *R. v. Maule*, 41 L. J. M. C. 47), and a statement of the grounds of appeal. Upon appeal, a jury decides whether the old highway is

unnecessary, or the proposed highway is nearer or more commodious, and whether the appellant is aggrieved. If there be no appeal, or the appeal fail, the court must order the stoppage or diversion of the highway, and the purchase of the ground for the new one, which thenceforth becomes a public highway. A certificate affecting several highways may, on appeal, be partly confirmed, and partly not; *R. v. Midgley L. B.*, 5 B. & S. 621.

As to notice of the vestry meeting, see *R. v. Powell*, L. R. 8 Q. B. 403; as to the surveyor's expenses, see *United Land Co. v. Tottenham L. B.*, 13 Q. B. D. 640. The certificate for diversion may be granted if the new highway is either "nearer or more commodious;" and the addition of fresh land to an old narrow highway, so as to widen it and make it more commodious, constitutes it a new highway; *R. v. Phillips*, L. R. 1 Q. B. 648, where *R. v. Shiles*, 1 Q. B. 919, and *Welch v. Nash*, 8 East, 394, were dissented from. Publication of the notices is a condition precedent to the justices' jurisdiction to grant a certificate; *R. v. Surrey*, L. R. 5 Q. B. 466. The certificate is sufficient if it state the existence of the circumstances required by s. 85; *R. v. Harvey*, 10 Id. 46.

The Highway Act, 1862, s. 44, extends the above provisions of the Highway Act, 1835, to all highways paved, repaired, or cleansed under local or personal Acts, except highways repairable, under any Act, by a railway company or by the owners, &c., of a canal or river.

By the Highway Act, 1862, highway boards; by the Public Health Act, 1875, urban sanitary authorities; by the Highways and Locomotives (Amendment) Act, 1878, rural sanitary authorities; and by the Local Government Act, 1894, district councils are made surveyors of highways.

56 & 57 Vict.
c. 73.

In rural parishes the powers and duties of the inhabitants in vestry assembled have been transferred, in general, to the parish council by the Local Government Act, 1894; and so, in general, have the powers and duties of churchwardens. By sect. 13, the consent of both the parish council and the district council is required for the stoppage or diversion of a highway within a rural parish; and the parish council must give public notice of its resolution to give such consent, and such resolution is inoperative if not confirmed by the parish council at a meeting held not less than two months after the public notice is given, or if a parish meeting held before the confirmation veto the consent.

iv. *By whom a highway is to be repaired.*—At common law, the liability to repair all highways within a parish rests *primâ facie* on its inhabitants—*i.e.* on the occupiers of the land therein; 1 Rolle's Abr. 390 B.; *Austin's Case*, 1 Vent. 183, 189; *R. v. Sheffield*, 2 T. R. 106; *R. v. St. George, Hanover Square*, 3 Camp. 222; *R. v. Netherthong*, 2 B. & Ald. 179; *Cubitt v. Maxse*, L. R. 8 C. P. 704. In *R. v. Bradfield*, L. R. 9 Q. B. 552, it was held that there was nothing in the fact of a road having been originally set out in an inclosure award as a private road repairable by the adjoining landowners, to prevent it from becoming, by dedication implied from user, a highway repairable by the inhabitants at large; and *R. v. St. Benedict*, 4 B. & Ald. 447, apparently to the contrary, was discussed.

4. By whom highway is to be repaired.

At common law occupiers of land bound to repair all highways in parish.

Where a place happened to be extra-parochial, it seemed doubtful how the repair was to be enforced; *R. v. Kingsmoor*, 2 B. & C. 190; *R. v. Midville*, 4 Q. B. 240.

The liability of the inhabitants may indeed be suspended, and the burden imposed on other persons, under certain circumstances. But then, if those persons become in any way unable, or cease to be compellable, to perform the duty of reparation, the dormant liability of the inhabitants revives; *R. v. Sheffield*, 2 T. R. 106; *R. v. Oxfordshire*, 4 B. & C. 194; *R. v. Lordsmere*, 15 Q. B. 689. The inhabitants cannot, by any agreement whatever, exonerate themselves from this inherent liability; 1 Vent. 90; *R. v. Liverpool*, 3 East, 86; *R. v. Scarisbrick*, 6 A. & E. 509; *R. v. Beeby*, 8 L. J. M. C. 38; *R. v. Ashby Folville*, L. R. 1 Q. B. 213; *R. v. Ardsley*, 3 Q. B. D. 255.

Liability of parish may be suspended and revived.

Cannot be extinguished by agreement.

The common law liability of the inhabitants to repair all the highways situate within the parish has been considerably narrowed by statute in respect of highways created since 1835.

Common law liability of parish narrowed by 5 & 6 W. 4, c. 50.

The Highway Act, 1835, by s. 23 (which is not retrospective, *R. v. West Mark*, 2 M. & Rob. 305), provided that no road or occupation way, made by a private person or corporation, nor any road, set out as a private drift-way or horse-path in any inclosure award, is to be deemed a highway repairable by the inhabitants of a parish, unless the procedure and conditions prescribed by the statute have been complied with.

S. 23.

The effect of this Act is that there may now be highways which no one is liable to repair, because they are modern and the requirements of the Act have not been complied

Modern highways.

with; *Roberts v. Hunt*, 15 Q. B. 17; *Fawcett v. York & N. M. R. Co.*, 16 Id. 614; see *Eyre v. New Forest H. B.*, 56 J. P. 517.

Unnecessary highways.

27 & 28 Vict. c. 101; 41 & 42 Vict. c. 77.

56 & 57 Vict. c. 73.

Streets.

38 & 39 Vict. c. 55; 53 & 54 Vict. c. 59.

There may also now be highways which the parish is not liable to repair, because they have become *unnecessary* for public use, and the proceedings, prescribed by the Highway Act, 1864, s. 21, or the Highways and Locomotives (Amendment) Act, 1878, s. 24, have been taken to have them declared to be no longer repairable by the parish or at the public expense. These Acts, however, provide means for reviving the parish's liability in case the highways again become of public use. Under the Local Government Act, 1894, s. 13, the consent of the parish council is required for a declaration that a highway within a rural parish be not repairable at the public expense.

The Public Health Act, 1875, ss. 150, 152, and the Public Health Acts Amendment Act, 1890, s. 41, contain provisions, under which the local authority can compel the frontagers to properly make up any "street," which is not a highway repairable by the inhabitants, or to bear the expenses of the work, when done, and can, subject to the proprietor's veto, declare any such "street," when properly made up, to be a highway repairable by the inhabitants.

The effect of these provisions of the Public Health Act, 1875, upon s. 23 of the Highway Act, 1835, is said to be uncertain; see *R. v. Dukinfield*, 4 B. & S. 158, according to which, the authority, if it received notice of an intention to dedicate a new "street," would not now be bound to be satisfied with it, unless everything had been done which could be required under sect. 150 of the Public Health Act. It must be observed that the object of the Highway Act, 1835, s. 23, is to prevent the burden of repair falling on the parish; whereas one of the objects of the Public Health Act, 1875, ss. 150, 152, is to enable the parish to undertake the burden. Viewed in this light, there seems to be no inconsistency between these Acts.

Extraordinary traffic.

41 & 42 Vict. c. 77.

By sect. 23 of the Highways and Locomotives (Amendment) Act, 1878, the expenses incurred in repairing a highway, "by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon," may be recovered from the person by whose order the weight or traffic has been conducted; see *Hill v. Thomas*, (1893) 2 Q. B. 333, and *Etherley Grange Coal Co. v. Auckland D. H. B.*, (1894) 1 Q. B. 37, as to the meaning of "extra-

ordinary traffic ;” and *Kent C. C. v. Vidler*, (1895) 1 Q. B. 448, 452, *per* Lord Esher, as to that of “excessive weight.” The expenses are not recoverable from the executor of a person who was liable to pay them ; *Story v. Sheard*, (1892) 2 Q. B. 515.

Under the Local Government Act, 1888, s. 11, “main roads” are now, as a general rule, repairable by county councils. As to main roads, see that Act, and also the Highways and Locomotives (Amendment) Act, 1878, and the Highways and Bridges Act, 1891. Main roads.

Although parishes are still liable to indictments, if any of their highways be out of repair, yet the above-mentioned Acts and the Highway Acts, 1835 to 1885, have, in effect, though not in law, relieved the parishioners, either entirely, or to a considerable extent, from the actual care of their highways, by imposing upon public authorities the duty of executing the repairs and of paying for them out of their funds. It is, however, beyond the scope of this note to deal with the *statute* law in detail.

The presumption at common law is that the inhabitants of the parish are liable to repair. This liability, however, may be shown to be upon other persons, under certain circumstances. These are :— Liability of other persons than parish to repair.

1. Where the owner of open land through which an ancient highway passes incloses the land, the occupier becomes liable to repair the highway to the extent of the enclosure ; *Duncombe’s Case*, Cro. Car. 366 ; *Henn’s Case*, Sir W. Jones, 296 ; *Steel v. Prickett*, 2 Stark, 463, 469. The reason of this is that the enclosure prevents the public from exercising their right of going on to the adjacent land when the highway is impassable. There is no such liability when the highway did not exist before the inclosure ; *R. v. Ramsden*, E. B. & E. 949 ; see *R. v. Hatfield*, 4 B. & Ald. 75 ; *R. v. Flecknow*, 1 Burr. 461 ; *Steel v. Prickett*, *supra*. This liability is stricter than that of the parish, which is only obliged to keep a road in the same state in which it has always been, and it is a liability to maintain a *perfect good way* ; and if the way be bad, the public may make gaps in the enclosure and pass over the inclosed land to avoid the bad way ; 1 Roll. Abr. 390, A. pl. 1 ; *Duncombe’s Case*, and *Henn’s Case*, *supra*. (1) By inclosure of adjoining land.

This liability is on the occupier, and not on the owner ; *R. v. Ramsden*, *supra*. It ceases with the removal of the enclosures ; *Id. per* Crompton, J. ; *R. v. Stoughton*, 2 Wms.

Saund. 160 b. If one person inclosed both sides, the liability is to repair the whole road ; if he inclosed on one side only, the liability is to repair to the middle of the road ; and where there was an ancient inclosure on one side, and he inclosed on the other, the liability is to repair the whole ; *Steel v. Prickett* and *R. v. Stoughton, supra*.

25 & 26 Vict.
c. 61.

By virtue of the Highway Act, 1862, s. 46, this liability does not now arise, when fences are erected with the written consent of the district highway board, or, where there is none, with the consent of the surveyor or other authority having jurisdiction over the highway.

(2) Liability
by prescrip-
tion.
Of corpora-
tion.

2. The burthen of repair may be cast on a particular person by prescription : this prescription, if alleged against a corporation, may be general ; *R. v. St. Giles*, 5 M. & S. 260, *per* Bayley, J. ; see *R. v. Birmingham & Gloucester R. Co.*, 3 Q. B. 223, and *R. v. Great Northern R. Co.*, 9 Q. B. 315, which show that a corporation may be indicted for both non-feasance and mis-feasance, and, therefore, for non-repair ; but, if the prescription be alleged against an individual, some consideration for it must be shown : *e.g.*, the tenure of lands by such service ; 1 Hawk. P. C., c. 76, s. 8 ; see *R. v. Kerrison*, 1 M. & S. 435 ; 13 Rep. 33 ; Bac. Abr. *Highway*, F. ; *R. v. St. Giles, supra* ; *Priestly v. Foulds*, 2 M. & Gr. 175.

Of private
individual.

Of parish.

Whether it can be alleged at all against the inhabitants of another parish is most doubtful ; but it certainly cannot without showing some consideration : *R. v. St. Giles, supra* ; *R. v. Ashby Folville*, L. R. 1 Q. B. 213 ; see also *R. v. Ardsley*, 3 Q. B. D. 255. Unless the inhabitants of the other parish be a corporate body capable of holding lands, tenure of land could not be the consideration ; see *R. v. Machynlleth*, 2 B. & C. 166 ; and, as already stated, if they be a corporation no consideration need be shown.

Whether obli-
gation *ratione*
tenuræ must
be immemo-
rial.

Whether the obligation must of necessity be immemorial has been doubted ; *R. v. Beeby*, 8 L. J. M. C. 38 ; but see *R. v. Hayman*, Moo. & M. 402 ; and *per* Taunton, J., *R. v. Middlesex*, 3 B. & Ad. 210. In *R. v. Scarisbrick*, 6 A. & E. 513, Mr. Cresswell contended that the rule is that the highway is presumed to be immemorial : and therefore the obligation also must be so too : but where the origin of the road can be shown, so may that of the obligation ; and he referred to *Lyme Regis v. Henley*, 3 B. & Ad. 77, to show that such an obligation is capable of a modern origin.

The obligation to repair *ratione tenuræ* is, for the purpose of indictments, the occupier's and not the owner's ; *R. v.*

Barker, 25 Q. B. D. 213, which settled the doubt caused by *R. v. Sutton*, 3 A. & E. 597; but the former may have a remedy over against the latter; *Baker v. Greenhill*, 3 Q. B. 148. The obligation is, like a charge, imposed on the land and every part of it. Hence, when lands held by such tenure are divided amongst several persons, the charge is not apportionable, but each is liable for the whole repairs, though he may have contribution from the others; *R. v. Bucklugh*, 1 Salk. 358; *R. v. Buckeridge*, 4 Mod. 48. The liability is only to keep the way in the state of repair in which it has immemorially been; *R. v. Cluworth*, 6 Mod. 163.

Obligation enforceable first against occupier.

The liability to repair, whether arising *ratione tenuræ*, or otherwise, is at an end when the road has been totally destroyed by natural causes; *e.g.*, when it has been washed away by the sea; *R. v. Bamber*, 5 Q. B. 279; *R. v. Hornsea*, 23 L. J. M. C. 59; but see *R. v. Greenhow*, 1 Q. B. D. 703, as to what amounts to total destruction.

Liability at an end when road destroyed.

At common law, the liability to repair by tenure also ceases upon the highway being so altered in character and course under statutory powers, as to become, practically, a new highway; *R. v. Barker*, 25 Q. B. D. 213, where the road was macadamized and straightened; see also *Heath v. Weaverham*, (1894) 2 Q. B. 108. At common law, too, when the road is widened, etc., though the old parts remain repairable as before, the new parts are repairable by the parish; *R. v. Cluworth*, 6 Mod. 163; *R. v. Surrey*, 2 Camp. 455; *R. v. W. Riding of Yorkshire*, 2 East, 353; *R. v. Middlesex*, 3 B. & Ad. 201; and as to turnpikes, see 4 Geo. 4, c. 95, s. 68; *R. v. Barton*, 11 A. & E. 343. When a road is widened or diverted under the Highway Act, 1835, the parish must, by s. 93, repair the whole of the widened road or all the new highway, as the case may be, but the justices must, by order, fix the amount to be paid by the persons or corporations, if any, previously liable to repair the old highway. By s. 62 of the same Act, a mode is provided for converting a highway repairable by a corporation or individual into a parish highway upon similar terms.

Liability when road altered.

Where a highway repairable *ratione tenuræ* appears on a competent surveyor's report not to be in proper repair, and the person liable to repair it fails on request to do so, the district council may do the repairs and recover the expenses from him, under the Local Government Act, 1894, s. 25 (2).

56 & 57 Vict. c. 73.

3. The inhabitants of a particular township or tithing within a parish, may, *by custom*, be bound to repair the

(3) Liability of township by custom.

highways lying within its own boundary, to the exoneration of the parishioners at large ; *R. v. Ecclesfield*, 1 B. & Ald. 348 ; *R. v. East Mark*, 11 Q. B. 877 ; and no consideration for the custom need be shown ; *Id.* ; nor proof be given that there are or have been ancient highways in the township ; *R. v. Barnoldswick*, 4 Q. B. 499. Such a custom places the township on the same footing as a parish with respect to its highways, whether new or old ; *R. v. Hatfield*, 4 B. & Ald. 75 ; *R. v. Eastrington*, 5 A. & E. 765 ; *R. v. Heage*, 2 Q. B. 132 ; *R. v. Ardsley*, 3 Q. B. D. 255 ; see 5 & 6 Will. 4, c. 50, s. 5. In like manner, a parish may, by immemorial custom, be charged with the repair of a bridge instead of the county ; *R. v. Hendon*, 4 B. & Ad. 628 ; but probably not with the repairs of a highway outside its boundary ; see *ante*, p. 178.

In *R. v. Rollett*, L. R. 10 Q. B. 469, a hamlet, lying within a township which had been immemorially accustomed to repair its own highways, claimed to be exempt by custom from contributing to the repair, but was held to be liable, in the absence of proof of any custom for it to repair within its own boundary. It seems, therefore, that a mere custom *not* to repair, unsupported by any consideration, is bad.

Liability of
owner to fence
excavations
near a public
road.

It may be mentioned here that the owner of land is under no legal obligation to fence an excavation in it, unless it is made so near to a highway as to be a public nuisance ; *Hounsell v. Smyth*, 7 C. B. N. S. 731 ; and a person who dedicates a way, restricts himself in the use of the adjoining land only to this extent : he cannot make any use of the land which renders the way dangerous to persons using it, for this would be derogating from his grant. He is not bound to fence the adjoining land, though it contain an excavation, nor is he liable to a person who strays from the road and is injured by falling into the excavation, unless it substantially adjoins the highway so as to be a nuisance ; see *Hardcastle v. S. Yorkshire R. Co.*, 4 H. & N. 67 ; *Barnes v. Ward*, 9 C. B. 392 ; and *Binks v. S. Yorkshire R. Co.*, 3 B. & S. 244. In *Hadley v. Taylor*, L. R. 1 C. P. 53, the occupier of an unfurnished warehouse adjoining a highway was held liable for not fencing a "hoisthole" within 14 inches of the highway, used to raise goods from the cellar to the upper floor of the warehouse.

Duty of
persons
diverting
highway.

It is the duty of persons diverting a highway under statutory powers to take proper precaution, by fencing or otherwise, to protect passengers from injury through going astray at the point of diversion ; *Hurst v. Taylor*, 14 Q. B. D. 918.

A person who uses any part of a highway in an unreasonable manner to the special damage of an individual passing along it is liable to an action ; as, for instance, if he leave a van, steam plough, or a roller on the grassy side of a highway, whereby a horse is frightened, although the obstacle did not project into the *via trita* sufficiently to obstruct the passage there ; *Harris v. Mobbs*, 3 Ex. D. 268 ; *Wilkins v. Day*, 12 Q. B. D. 110 ; see also *Fritz v. Hobson*, 14 Ch. D. 542, where the access to a house adjoining a highway was interfered with by an unreasonable user of the highway ; *Brown v. Eastern & Midlands R. Co.*, 22 Q. B. D. 391, where the nuisance was a heap of refuse on land adjoining the highway which frightened a horse as it passed ; *Fenna v. Clare*, (1895) 1 Q. B. 199, where the nuisance was a low-spiked wall abutting on the highway ; and *Barber v. Penley*, (1893) 2 Ch. 447, where the lessee of a theatre was held liable for obstruction to the access to adjacent premises caused by the crowd in the street waiting to enter the theatre, a case which may possibly require further consideration.

Nuisances on highways.

A private individual may not, however, of his own authority abate a nuisance on a highway unless it does him a special injury, and he may only interfere with it as far as is necessary to enable him to exercise his rights of passing along the highway ; *Dimes v. Petley*, 15 Q. B. 276 ; *Arnold v. Holbrook*, L. R. 8 Q. B. 96 ; *Denny v. Thwaites*, 2 Ex. D. 21.

Abating nuisance.

No action lies against a highway authority to recover damages for injuries caused by the highway being out of repair ; *Thompson v. Brighton*, (1894) 1 Q. B. 332, where all the earlier cases are cited ; *Saunders v. Holborn D. B.*, (1895) 1 Q. B. 64 ; and *Sydney v. Bourke*, (1895) A. C. 433. The law in this respect seems to be highly unsatisfactory. Water companies, which under their statutory powers have placed in the street an apparatus, which remains under their control, are liable for injuries caused by their neglect to keep it in repair ; *Chapman v. Fylde Co.*, (1894) 2 Q. B. 599.

Immunities of highway authorities.

Rivers.—The above observations have, to avoid confusion, been confined to highways over land ; but the channels of public navigable rivers are also highways ; see *Colchester v. Brooke*, 7 Q. B. 339, which contains much useful information upon the extent of the public rights in navigable tidal rivers ; see also *A.-G. v. Lonsdale*, 7 Eq. 377 ; *A.-G. v. Terry*, 9 Ch. 423 ; *Original Hartlepool Collieries v. Gibb*,

Channels of public navigable rivers highways.

5 Ch. D. 713 ; *Orr-Ewing v. Colquhoun*, 2 App. Cas. 839. As to the points material in considering whether a river is or is not a public highway, see *Bourke v. Davis*, 44 Ch. D. 110. A private individual's right to abate a nuisance on a public river is limited in the same way as it is on any other highway ; *Dimes v. Petley*, 15 Q. B. 276, *supra* ; see *Eastern Counties R. Co. v. Dorling*, 5 C. B. N. S. 821 ; *Marshall v. Ulleswater Co.*, L. R. 7 Q. B. 166.

Up to tidal
limit soil of
river in crown.

Up to the point reached by the flow of the tide the soil was presumably in the crown ; above that point, whether the soil at common law was in the crown or in the owners of adjacent lands, was a point perhaps not free from doubt ; but there was at least a jurisdiction in the crown to reform and punish nuisances therein. It was therefore at common law illegal to erect weirs, &c., so as to obstruct the channel. Those prior to Edward the First's reign are, however, legalised by the construction put upon 25 Edw. 3, c. 4, which provided for the destruction of those levied subsequently ; *Williams v. Wilcox*, 8 A. & E. 314 ; *Rolle v. Whyte*, L. R. 3 Q. B. 286 ; *Leconfield v. Lonsdale*, L. R. 5 C. P. 657.

ELWES v. MAW.

MICH. 43 GEO. 3.—IN THE KING'S BENCH.

[REPORTED 3 EAST, 38 (6 R. R. 523).]

A tenant in agriculture, who erected, at his own expense, and for the mere necessary and convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled, and let into the ground, cannot remove the same, though during his term, and though he thereby left the premises in the same state as when he entered. There appears to be a distinction between annexations to the freehold of that nature for the purposes of trade, and those made for the purposes of agriculture and better enjoying the immediate profits of the land, in favour of the tenant's right to remove the former; that is, where the superincumbent building is erected as a mere accessory to a personal chattel, as an engine; but where it is accessory to the realty, it can in no case be removed.

THE declaration stated that the plaintiff was seised in fee of a certain messuage, with the out-houses, &c., and certain land, &c., in the parish of Bigby, in the county of Lincoln, which premises were in the tenure and occupation of the defendant as tenant thereof to the plaintiff, at a certain yearly rent, the reversion belonging to the plaintiff; and that the defendant wrongfully, &c., intending to injure the plaintiff in his hereditary estate in the premises, whilst the defendant was possessed thereof wrongfully and injuriously, and without the licence and against the will of the plaintiff, pulled down divers buildings, parcel of the said premises, in his the defendant's tenure and occupation, viz., a *beast-house*, a *carpenter's shop*, a *waggon-house*, a *fuel-house*, and a *pigeon-house*, and a *brick wall* inclosing the fold-yard, and took and carried away the materials, which were the property of the plaintiff, as landlord, and converted them to his the defendant's own use; by reason whereof the reversionary estate of the plaintiff in the premises was greatly injured, &c. The defendant pleaded the general issue. And at the trial at the last Lincoln

assizes a verdict was found for the plaintiff, with 60*l.* damages, subject to the opinion of the court on the following case:—

The defendant occupied a farm, consisting of a messuage, cottages, barn, stables, out-houses, and lands, at Bigby, in the county of Lincoln, under a lease from the plaintiff for 21 years, commencing on the 12th May, 1779; which lease contained a covenant on the part of the tenant to keep and deliver up in repair the said *messuage, barn, stables, and outhouses*, and other buildings belonging to the said *demised premises*. About 15 years before the expiration of the lease the defendant erected upon the said farm at his own expense a substantial *beast-house, a carpenter's shop, a fuel-house, a cart-house, and pump-house*, and fold-yard. The buildings were of brick and mortar, and tiled, and the foundations of them were about one foot and a half deep in the ground. The carpenter's shop was closed in, and the other buildings were open to the front, and supported by brick pillars. The fold-yard wall was of brick and mortar, and its foundation was in the ground. The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials, leaving the premises in the same state as when he entered upon them. These erections *were necessary and convenient for the occupation of the farm*, which could not be well managed without them. The question for the opinion of the court was, Whether the defendant had a right to take away these erections. If he had, then a verdict to be entered for the defendant; if not, the verdict for the plaintiff to stand.

This case was first argued in Easter Term last by *Torkington* for the plaintiff, and *Clarke* for the defendant; and again in this term by *Vaughan*, Serjt., for the plaintiff, and *Balguy* for the defendant.

For the plaintiff it was argued that the removing the buildings in question was waste at common law, and that this case did not fall within any of the exceptions, which had been introduced *solely for the benefit of trade* in relaxation of the old rule. That rule was that whatever was once annexed to the freehold could never be severed again without the consent of the owner of the inheritance. Accordingly, glass windows, wainscot, benches, doors, furnaces, &c., though annexed by tenant for years for his

own accommodation, could not be removed by him again; Co. Litt. 53 a. The principle on which this was founded was the injury which would thereby arise to the inheritance from disfiguring the walls of the mansion; though some of these things were in their nature personal chattels supplying the place of mere movable utensils and furniture. But it never was questioned but that buildings let into the soil became part of the freehold, from the very nature of the thing. This was decided so long ago as Hil. 17 Ed. 2, 518, in a writ of waste against a lessee, who had built a house and pulled it down during his term. And Co. Litt. 53 a, which is to the same purpose, goes further and says, that even the building of such new house by the tenant is waste; but that is denied in *Lord Darcy v. Askwith* (a); though that also agrees that the letting down of such new house built by the tenant himself would be waste. So, taking down a stone wall, or a partition between two chambers, is waste; 10 Hen. 7, 2, pl. 3. It does not, indeed, appear by that book, whether those erections had been before made by the tenant himself: but they were so taken to be by Mead, J., in *Cooke v. Humphrey* (b). All this is confirmed by Lord Coke at the end of *Herlakenden's Case* (c), where it is said to have been adjudged in C. B. that glass fastened to the windows, or wainscot to the house, by the lessee, cannot be removed by him: and that it makes no difference in law whether the fastening of the latter be by great or little nails, screws or irons put through the posts or walls (as had been then of late invented), or in whatever other manner it was fastened to the posts or walls of the house. In all these cases the rule as between landlord and tenant seems to have followed that between heir and executor, founded upon the reason first mentioned: and no innovation upon the strict rule seems ever to have been admitted, except in the case before Lord C. B. Comyns (d) at nisi prius, of the cider-mill, which he held should go to the executor, and not to the heir; but upon what particular grounds does not appear: and the case of *Culling v. Tufnal* (e), before Lord Ch. J. Treby, at Hereford, in 1694, where a barn erected by a tenant upon pattens and blocks of timber, lying on

(a) Hob. 234.

(b) Moor. 177.

(c) 4 Rep. 63, 4.

(d) Cited in *Lawton v. Lawton*, 3 Atk. 13, 16.

(e) Bull. N. P. 34.

but *not* let *into* the ground, was holden to be removable by the tenant: but even there he relied on the *custom of the country* in favour of the tenant, with reference to which it might be presumed that he and his landlord had contracted (*f*). The only established exception (which the plaintiff's counsel admitted was as old as the rule itself) is in favour of trade, with respect to articles annexed to the freehold for the purpose of carrying on trade and manufactures. In 20 Hen. 7, fo. 13, pl. 24, an heir brought trespass against executors for taking away a furnace fixed to the freehold with mortar, and the taking was holden tortious. But it was there said "that if a lessee for years set up such a furnace for his own advantage, or a dyer his vats and vessels to carry on his business (*g*), during the term he may remove them; but if he suffer them to be fixed to the land after the end of the term, then they belong to the lessor; and so of a baker." Then follows, "It is no waste to remove such things within the term by any." But this is said to have been against the opinions before mentioned, and to have been doubted in the 42 Ed. 3, p. 6, pl. 19, whether it were waste or not. It is clear, therefore, from the whole of the passage, that the only generally admitted exception was in favour of traders, which is shown by the examples of the dyer and baker affixing vessels *pur occupier son occupation*: and that at least it was doubtful whether the same privilege extended to others affixing to the freehold similar articles. And the exception is the more remarkable because at that early period agriculture must have been of much greater importance to the state than trade. This distinction was continued in later times. In *Poole's Case* (*h*), M. 2 Ann., in an action on the case by a lessee against the sheriff of Middlesex, who had taken in execution the vats, coppers, tables, partitions, and pavement, &c., of an underlessee, a soap-boiler, which he had put up as fixtures for the convenience of his trade, Lord C. J. Holt held that during the term the soap-boiler might well remove the vats set up in relation to trade, by the common law; but that there was a difference between what he did to carry on his trade, and what he did to complete the house; as

(*f*) See *Wigglesworth v. Dallison*, ante, vol. i. p. 528, *et notas*. *occupier son occupation.*"

(*h*) 1 Salk. 368.

(*g*) The words in the original are "*pur*

hearths and chimney-pieces; which he held not removable. The next case was *Cave v. Cave* (i), in 1705, where the Lord Keeper held that not only wainscot, but pictures and glasses put up in the place of wainscot, should go to the heir and not to the executor to prevent the house being disfigured. Then followed *Lawton v. Lawton* (k), where it was decreed by Lord Hardwicke, C., that a fire-engine erected for the benefit of a colliery by the tenant for life should be considered as personal estate, and go to his executor, and not to the remainderman, in favour of creditors. But there it was proved to be *customary* to remove such an engine; that in building the shed for its security *holes were left* for the ends of the timber *to make it more commodious for removal*; and that it was very capable of being removed. The evidence relied on by the other side was, that it could not be removed without tearing up the *soil* and destroying the *brickwork*. But Lord Hardwicke considered the brickwork there as a mere *accessory* to the engine, which in its own nature was a mere personal movable chattel. One reason, he said, which weighed with him was, that it was a *mixed* case, between enjoying the profits of the land and carrying on a *species of trade*; and, considering it *in that light*, it came near the instances of furnaces and coppers in brewhouses. That decision was in 1743. In *Ex parte Quincy* (l), in 1750, where the principal question was whether the *utensils* of a brewhouse passed by a mortgage of the brewhouse with the *appurtenances*, it is said that a tenant may, during the term, take away *chimney-pieces* and even *wainscot*; but the latter is observed to be a very strong case. The same was before said in *Lawton v. Lawton*, with this difference, that it was there said of wainscot *fixed only by screws* and of *marble* chimney-pieces. This opinion may have proceeded, as it did in *Beck v. Rebow* (m), upon the consideration that matters of this sort were merely *ornamental furniture*, and not necessary to the enjoyment of the freehold. The case of *Lord Dudley v. Lord Warde* (n), in 1750, was like that of *Lawton v. Lawton*, on the authority of which it was decided. There Lord Hardwicke recognised the general rule, with the single exception, as between landlord and tenant, that fixtures annexed

(i) 2 Vern. 508.

(k) 3 Atk. 13.

(l) 1 Atk. 477.

(m) 1 P. Wms. 94.

(n) Ambl. 113, and Bull. N. P. 34.

by the latter *for the sake of trade* might be removed. There, too, the fire-engine was considered as a *principal*, and the building erected over to preserve it as the mere *accessory*; and the colliery itself as in part the carrying on of a *trade*. In *Lawton v. Salmon*, E. 22 Geo. 3, B. R. (o), *salt pans* were holden to go to the heir and not to the executor: and though Lord Mansfield said that the rule had been relaxed as between landlord and tenant, tenant for life and remainderman, in respect of things put up by the tenant in possession; still he confined the relaxation to things so affixed *for the benefit of trade*. And he there alluded to the case of the cider-mill (doubtfully) as standing alone, and not printed at large. Then the case of *Dean v. Allalley* (p), sittings after Easter, 39 Geo. 3, was a case where two sheds called *Dutch barns*, which had been erected by the tenant during his term, were removed by him: and being sued on his covenant, by which he undertook to leave all buildings which then were, or *should be erected* on the premises during the term in repair, Lord Kenyon, at nisi prius, held that buildings of that description were not included; and said that the law would make the most favourable construction for the tenant where he had made necessary and useful erections *for the benefit of his trade or manufacture*. Of what precise description the buildings there were does not appear; possibly not affixed to the ground (q), at least not such parts as were removed. If not, the case amounts to not more than that of *Penton v. Robart* (r), where a *varnish-house* of wood, which had been erected on a brick foundation by the tenant *for the purpose of carrying on his trade*, was removed by him. But it did not appear there that the *foundation* was removed, but only the *superstructure of wood*, which had been *brought by the tenant from another place*, where he had before carried on his business. Lord Kenyon, indeed, there laid stress on the instances of gardeners and nurserymen in the neighbourhood of the metropolis erecting greenhouses, &c., which he considered that they would be at liberty to remove. Whether that be done under particular agreements or not does not appear: but supposing the law would imply an exception in favour of

(o) Cited in a note to *Fitzherbert v. Shaw*, 1 H. Bl. 259. The principal case turned on a particular agreement.

(p) 3 Esp. 11.

(q) *Vide post*, what account was given of this case in the arguments of the defendant's counsel.

(r) 2 East, 88.

tenants of that description, it would only be upon the ground of considering them as carrying on a species of trade; the very nature of their occupation and of the letting being to enable them to disannex even trees from the land (s). But none of the cases have gone the length now contended for: and the very grounds on which exceptions have been made from the general rule preclude the present case. Erections of this sort are not in their nature temporary or movable, but are calculated solely for the enjoyment of the land: the expense of erecting them is great, and their value is great on the spot, but of trifling consideration when removed; the injury of their removal, therefore, is much greater to the landlord than the benefit of the materials when removed is to the tenant. If the exception were extended to buildings erected for the purposes of agriculture, it would be as extensive as the rule itself, and would therefore destroy it. The sole object of such erections is for the purpose of enjoying the produce of the land; the *land*, therefore, is the principal, and the buildings the *accessory to the land*. This distinguishes it essentially from buildings erected for engines or machinery used in trade, where the *personal chattel* is the principal. No other line than this can be drawn without overthrowing all the authorities.

For the defendant it was contended that the old rule of law had been gradually relaxed between landlord and tenant, though not so much between tenant for life and remainderman, or between heir and executor. The object has been to encourage tenants to lay out their money in the improvement of the premises, and in making their industry as productive as possible, which is for the benefit of the state as well as the individuals, and applies at least as strongly to tenants in husbandry as in trade. Agriculture, in the improved state in which it is now carried on, is in itself a trade; it requires a much larger capital than formerly, and the use of more expensive implements and machinery. Without the aid of modern improvements, the land cannot be made so productive as it otherwise may be, nor the produce so well preserved and brought to market. But unless the tenant is entitled to take

(s) Lawrence, J., on the first argument, intimated, that if ground were let expressly for *nursery* ground it might be considered as implied in the terms of the contract, that it was to be used for taking

up young trees, &c., as is usual in such cases. But he expressed a wish to be informed of the usual terms of the leases under which such grounds were holden in the neighbourhood of the metropolis.

away with him at the end of his term, or have a compensation in value for, buildings like these in question, erected in such a manner as to be capable of being removed at pleasure and set up on any other farm, he will not be at the expense of erecting them at all; and therefore though he, and through him the public, will suffer, yet the landlord will not be the better for the right which he now claims. This is no question whether permanent additions or improvements made by a tenant to the old dwelling-house or out-buildings, or even new ones of that sort erected by him for his personal accommodation, are to be removed at the end of the term; for not even persons renting premises for the purpose of carrying on trades have any such privilege: but whether buildings so erected for the sole purpose and convenience of carrying on the farm, that is, of turning to the best account the capital and industry of the farmer in his trade or business, may not be removed by him. The materials of which the buildings are composed cannot vary the law, but the objects and interests of the persons concerned. If in the case *Dean v. Allalley* (t) the tenant was entitled to remove the buildings called *Dutch barns*, the same rule will apply to the buildings in question, which are as much calculated for removal. For in that case (as appears from the MS. note of one of the counsel in the cause), the sheds erected "had a foundation of brick in the ground, and uprights fixed in and rising from the brickwork, and supporting the roof, which was composed of tiles, and the sides open," as in the present case. If the exception be confined to erections for the benefit of trade, Lord Kenyon in that case considered the *Dutch barns* as coming within that description. This is consonant to the opinion delivered by the same learned judge in *Penton v. Robart* (u). It is true that was the case of a *varnish-house*; but it is clear that his lordship's opinion was founded on the extension of the exception in the case of landlord and tenant generally; for in the instances put by him in illustration of his opinion are cases of gardeners and nurserymen, whose profits are derived out of the immediate produce of the land: and the buildings now in question are no more annexed to the soil than the varnish-house there was, which was on a foundation of brick, or than the

(t) 3 Esp. 11, and MS.

(u) 2 East, 88.

hothouses and greenhouses of the persons alluded to. But the argument does not rest alone on very modern cases, but is strongly supported by the decisions of Lord Hardwicke in the cases of *Lawton v. Lawton* (x) and *Lord Dudley v. Lord Ward* (y). There, even as between tenants for life or in tail and the remaindermen, the executors of the former were holden entitled to the fire-engines of collieries; buildings which must in their very nature be annexed to the soil, and without which the profits of the land, viz., the coal, could not be taken. Those were, indeed, said to be *mixed* cases between taking the profit of land and carrying on a trade; but wherefore mixed does not so plainly appear. So the case of the cider-mill is directly in point: that is as essential to the enjoyment of the land in that particular species of produce out of which the cider is to be made, as barns and other buildings are to the enjoyment of arable, or beast-houses of pasture-land. That case was much stronger than what is now contended for; the question arising there between the heir and executor, where it may be admitted that the old rule has prevailed much stricter. All the cases therefore in the books between persons standing in that relation may well be laid out of the question, as they turn upon the presumed intention of the ancestor or testator in favour of the heir, that the inheritance should descend to him entire and undefaced. But the case of *Culling v. Tufnal* (z), before Lord Ch. J. Treby, which is in point, was between landlord and tenant. That was a case of a *barn* removed by the tenant: and though the foundations were not dug into the ground, yet its very weight must have sunk it in some measure below the surface of the soil. It is true that case was put by him on the ground of the custom of the country, but Buller, J., in citing it, observes that now, without any custom, it would be determined in favour of the tenant without any difficulty; for that the old rule had been relaxed as between landlord and tenant, &c., though still preserved as between heir and executor. No distinction is there hinted at between trade and agriculture. In *Fitzherbert v. Shaw* (a) the question, it is true, turned at last on the agreement; but Gould, J., was decidedly of opinion at the trial, that if the tenant had removed

(x) 3 Atk. 13.

(y) Ambl. 113.

(z) Bull. N. P. 34.

(a) 1 H. Bl. 258.

the buildings during the term, he would have been justified in so doing; and there some of the things removed were a shed *built on brickwork*, and some *posts and rails* erected by the tenant, all which must have been let into the ground, and were adapted to purposes of agriculture. Upon the whole, they contended that the only line to be drawn from all the books was, that whatever buildings were erected by a tenant (be the materials what they may, or however placed in or upon the ground), for the immediate purposes of his trade, or for the more advantageous taking or improving the profits of his farm, he may remove them again, provided he leave the premises on his quitting as he found them. According to this rule no injury could ensue to the landlord, whose property would, on the contrary, he eventually benefited by the better cultivation of it, while the public would derive an immediate advantage from the encouragement afforded to the capital and industry of the tenant.

Cur. adv. vult.

LORD ELLENBOROUGH, Ch. J., now delivered the opinion of the Court. This was an action upon the case in the nature of waste by a landlord, the reversioner in fee, against his late tenant, who had held under a term for twenty-one years a farm consisting of a messuage and lands, outhouses, and barns, &c., thereto belonging, and who, as the case reserved stated, during the term and about fifteen years before its expiration, erected at his own expense a *beast-house*, a *carpenter's shop*, a *fuel-house*, a *cart-house*, a *pump-house*, and *fold-yard*. The buildings were of brick and mortar, and tiled, and the foundations of them were about a foot and a half deep in the ground. The *carpenter's shop* was closed in, and the other buildings were open to the front and supported by brick pillars. The *fold-yard wall* was of brick and mortar, and its foundation was in the ground. The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials; leaving the premises in the same state as when he entered upon them. The case further stated that these erections were *necessary and convenient for the occupation of the farm*, which could not be well managed without them. And the question for the opinion of the court was, Whether the defendant had a right to take away these

erections? Upon a full consideration of all the cases cited upon this and the former argument, which are indeed nearly all that the books afford materially relative to the subject, we are all of opinion that the defendant had not a right to take away these erections.

Questions respecting the right to what are ordinarily called fixtures principally arise between three classes of persons. 1st. Between different descriptions of representatives of the same owner of the inheritance; *viz.*, between his *heir* and *executor*. In this first case, *i.e.*, as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, anything which has been affixed thereto. 2ndly, Between the *executors of tenant for life or in tail*, and the *remainderman or reversioner*; in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The third case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels as against the claimant in respect of freehold or inheritance, is the case between *landlord* and *tenant*.

But the *general rule* on this subject is that which obtains in the first-mentioned case, *i.e.*, between heir and executor; and that rule (as found in the Year-book, 17 E. 2, p. 518, and laid down at the close of *Herlakenden's Case*, 4 Co. 64, in Co. Litt. 53, in *Cooke v. Humphrey*, Moore, 177, and in *Lord Darcy v. Askwith*, Hob. 234, in the part cited by my brother Vaughan, and in other cases), is, that where a lessee, having *annexed* anything to the freehold during his term, afterwards takes it away, it is waste. But this rule at a very early period had several exceptions attempted to be engrafted upon it, and which were at last effectually engrafted upon it, in favour of trade and of those vessels and utensils which are immediately subservient to the purposes of trade. In the Year-book, 42 Edw. 3, 6, the right of the tenant to remove a furnace erected by him during his term is doubted and adjourned. In the Year-book of the 20 Hen. 7, 13 a & b, which was the case of trespass against executors for removing a furnace fixed with mortar by their testator, and annexed to the freehold, and which was holden to be wrongfully done, it is laid down that, "if a lessee for years make a furnace

for his advantage, or a dyer make his vats or vessels *to occupy his occupation, during his term* he may remove them: but if *he suffer them to be fixed to the earth after the term, then they belong to the lessor*. And so of a baker. And it is not waste to remove such things within the term by some: and this shall be against the opinions aforesaid." But the rule in this extent in favour of tenants is doubted afterwards in 21 Hen. 7, 27, and narrowed there, by allowing that the lessee for years could only remove, within the term, things *fixed to the ground, and not to the walls* of the principal building. However, in process of time the rule in favour of the right in the tenant to remove *utensils set up in relation to trade* became fully established: and accordingly we find Lord Holt, in *Poole's Case*, 1 Salk. 368, laying down (in the instance of a soap-boiler, an under-tenant, whose vats, coppers, &c., fixed, had been taken in execution, and on which account the first lessee had brought an action against the sheriff), that *during the term the soap-boiler might well remove the vats he set up in relation to trade*; and that he might do it by the common law, and not by virtue of any special custom, *in favour of trade, and to encourage industry*; but that after the term, they became a gift in law to him in reversion, and were not removable. He adds that there was a difference between what the soap-boiler did *to carry on his trade*, and what he did to complete *his house*, as *hearths and chimney-pieces*, which he held not removable. The indulgence in favour of the tenant for years during the term, has been since carried still further, and he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. *Beck v. Rebow*, 1 P. Wms. 94; *Ex parte Quincy*, 1 Atk. 477; and *Lawton v. Lawton*, 3 Atk. 13. But no adjudged case has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself who built them, during his term.

In deciding whether a particular fixed instrument, machine, or even building, should be considered as removable by the executor, as between him and the heir, the court, in the three principal cases on this subject (*viz.*, *Lawton v. Lawton*, 3 Atk. 13, which was a case of *a fire-engine to work a colliery erected by tenant*

for life : *Lord Dudley v. Lord Warde*, Ambler, 113, which was also the case of a fire-engine to work a colliery erected by tenant for life (these two cases before Lord Hardwicke) : and *Lawton, executor, v. Salmon*, E. 22 G. 3, 1 H. Black. 259, in notis, before Lord Mansfield, which was the case of salt pans, and which came on in the shape of an action of trover brought for the salt pans by the executor against the tenant of the heir at law), may be considered as having decided mainly on this ground, that where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle), was an accessory to a matter of a personal nature, that it should be itself considered as personalty. The fire-engine, in the cases in 3 Atk. and Ambler, was an accessory to the carrying on the trade of getting and vending coals ; a matter of a personal nature. Lord Hardwicke says, in the case in Ambler, "A colliery is not only an enjoyment of the estate, but in part carrying on a trade." And in the case in 3 Atk. he says, "One reason that weighs with me is its being a mixed case, between enjoying the profits of the lands, and carrying on a species of trade : and considering it in this light, it comes very near the instances in brew-houses, &c., of furnaces and coppers." Upon the same principle Lord C. B. Comyns may be considered as having decided the case of the cider-mill, i.e., as a mixed case between enjoying the profits of the land and carrying on a species of trade ; and as considering the cider-mill as properly an accessory to the trade of making cider.

In the case of the salt pans, Lord Mansfield does not seem to have considered them as accessory to the carrying on a trade ; but as merely the means of enjoying the benefit of the inheritance. He says, "*the salt spring is a valuable inheritance, but no profit arises from it unless there be a salt work ; which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance.*" Upon this principle he considered them as belonging to the heir, as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor, as the means or instrument of carrying on a trade. If, however, he had even considered them as belonging to the executor, as utensils of trade ;

or as being removable by the tenant, on the ground of their being such utensils of trade ; still it would not have affected the question now before the court, which is the right of a *tenant for mere agricultural purposes* to remove buildings fixed to the freehold, which were constructed by him for the ordinary purposes of husbandry, and connected with no description of trade whatsoever : and to which description of buildings no case (except the *nisi prius* case of *Dean v. Allalley*, before Lord Kenyon, and which did not undergo the subsequent review of himself and the rest of the court), has yet extended the indulgence allowed to tenants in respect to buildings for the purposes of trade. In the case in Buller's *Nisi Prius*, 34, of *Culling v. Tufnal*, before Lord Ch. J. Treby, at *nisi prius*, he is stated to have holden that the tenant who had erected a *barn* upon the premises, and put it *upon pattens and blocks of timber lying about the ground*, but *not fixed in or to the ground*, might by the custom of the country take them away at the end of his term. To be sure he might, and that without any custom ; for the terms of the statement exclude them from being considered as *fixtures* : “ they were not *fixed in or to the ground*.” In the case of *Fitzherbert v. Shaw*, 1 H. Black. 258, we have only the opinion of a very learned Judge indeed, Mr. Justice Gould, of what *would have been* the right of the tenant, as to the taking away a *shed built on brickwork*, and some *posts and rails* which he had erected, if the tenant had done so during the term : but, as the term was put an end to by a new contract, the question what the tenant could have done in virtue of his right under the old term, if it had continued, could never have come judicially before him at *nisi prius* ; and when that question was offered to be argued in the court above, the counsel were stopped, as the question was excluded by the new agreement. As to the case of *Penton v. Robart*, 2 East, 88, it was the case of a *varnish-house*, with a brick foundation let into the ground, of which the *woodwork had been removed from another place*, where the defendant had carried on his trade with it. It was a *building for the purpose of trade* ; and the tenant was entitled to the same indulgence in that case which, in the cases already considered, had been allowed to other buildings for the purposes of trade ; as furnaces, vats, coppers, engines, and the like. And though Lord Kenyon, after putting the case upon the ground of the leaning

which obtains in modern times in favour of the *interests of trade*, upon which ground it might be properly supported, goes further, and extends the indulgence of the law to the erection of green-houses and hothouses by nurserymen, and, indeed, by implication, to buildings by all other tenants of lands; there certainly exists no decided case, and, I believe, no recognised opinion or practice on either side of Westminster Hall, to warrant such an extension. The nisi prius case of *Dean v. Allalley* (reported in Mr. Woodfall's book, p. 207, and Mr. Espinasse's, 3 vol., 11), is a case of the erection and removal by the tenant of two *sheds* called *Dutch barns*, which were, I will assume, unquestionably fixtures. Lord Kenyon says, "The law will make the most favourable construction for the tenant where he has made necessary and useful *erections for the benefit of his trade or manufacture*, and which enable him to carry it on with more advantage. It has been so holden in the case of cider-mills, and other cases; and I shall not narrow the law, but hold erections of this sort, *made for the benefit of trade*, or *constructed as the present*, to be removable at the end of the term." Lord Kenyon here uniformly mentions *the benefit of trade*, as if it were a building subservient to some purposes of trade; and never mentions agriculture, for the purposes of which it was erected. He certainly seems, however, to have thought that buildings erected by tenants for the purposes of farming, were, or rather *ought to be*, governed by the same rules which had been so long judiciously holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always *put and recognised as a known allowed exception* from the general rule which obtains as to other buildings; and the circumstance of its being so treated and considered establishes the existence of the general rule to which it is considered as an exception. To hold otherwise, and to extend the rule in favour of tenants to the latitude contended for by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants. But its danger or probable mischief is not so properly a consideration for a court of law, as whether the adoption of such a doctrine would be an innovation *at all*: and, being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in

conformity to and in support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case.

Postea to the plaintiff.

Term "fix-
ture" used in
different
senses.

THE word *fixture* has been used by different writers to express different meanings; see *Sheen v. Rickie*, 5 M. & W. 175, where it was held that *after verdict* it might even be assumed that they were articles for which trover would lie, and *Dalton v. Whitem*, 3 Q. B. 961. In *Hallen v. Runder*, 1 C. M. & R. 266, 276, which was an action for fixtures bargained and sold, and sold and delivered, the court said that "the word fixtures has acquired the peculiar meaning of chattels which have been annexed to the freehold, but which are removable at the will of the person who annexed them." The court, in that case, thought that neither were they *goods*, properly speaking (see *Clark v. Bulmer*, 11 M. & W. 243; *Tripp v. Armitage*, 4 Id. 687; *Lee v. Gaskell*, 1 Q. B. D. 700; and *Finney v. Grice*, 10 Ch. D. 13), nor did a sale of them transfer any interest in lands within the meaning of s. 4 of the Statute of Frauds.

Definition
adopted in
this note.

It seems difficult, however, to use the term "fixtures" invariably in the above sense without producing some confusion; for if such be the universal meaning of the word, the same things would be *fixtures*, as between some persons, and not fixtures, as between others. It seems better, therefore, for the purposes of this note, to use the word "*fixture*" in that which appears to be its natural and most obvious sense, *viz.*, *anything annexed to the freehold*.

By the expression *annexed to the freehold*, is meant fastened to, or connected with it: mere juxtaposition, or the laying of an object, however heavy, on the freehold, does not amount to *annexation*. Thus in the case cited in the text from Buller's Nisi Prius, 34, of *Culling v. Tufnal*, where a tenant had erected a barn *on pattens and blocks of timber lying on the ground, but not fixed in, or to, the ground*, it was held that he might take them away at the end of his term. This was said in Buller to have been by the custom of the country; but Lord Ellenborough remarks in the text, p. 196, "To be sure he might, and that without any custom; *for the terms of the statement exclude them from being considered as fixtures. They were not fixed in, or to, the ground;*" see

Anthony v. Haney, 8 Bing. 186; *Horn v. Baker*, 9 East, 215, *post*, p. 223; *Davis v. Jones*, 2 B. & Ald. 165; and *Wiltshire v. Cottrell*, 1 E. & B. 674, where it was held that a granary resting upon staddles, which were built into the ground, but not attached to them except by its weight, was not a fixture in the ordinary sense of the word, so as to pass under the term "fixtures" in a conveyance.

In *Hellawell v. Eastwood*, 6 Exch. 295, a question arose as to whether certain machinery used for manufacturing purposes was attached to the freehold so as to be exempt from distress for rent. The machines consisted of "mules" used for spinning cotton, fixed some by means of screws into the wooden floors of the mill, and some by being sunk into the stone flooring and secured by molten lead. The court held that they had never become part of the freehold, and Parke, B., in delivering the judgment of the court, said, "they were attached slightly so as to be capable of removal without the least injury to the fabric of the building or to themselves; and the object and purpose of their annexation was not to improve the inheritance but merely to render the machines steadier and more capable of convenient use as chattels;" see also *Huntley v. Russell*, 13 Q. B. 572, and *Waterfall v. Penistone*, 6 E. & B. 876, in which case the court acted upon the rule laid down in *Hellawell v. Eastwood*. In *Mather v. Fraser*, 2 K. & J., 536, Wood, V.-C., fell into the mistake of imagining that the reasoning of Parke, B., in *Hellawell v. Eastwood*, was unnecessary, because the Vice-Chancellor supposed that tenants' fixtures are distrainable for rent; which they are not (see *ante*, vol. i., p. 426). Railway rails and sleepers laid in the ordinary way are fixtures; *Turner v. Cameron*, L. R. 5 Q. B. 306; *Ex p. Moore, etc., Co.*, 14 Ch. D. 379. So also are gaseliers screwed on to gas pipes; *Sewell v. Angerstein*, 18 L. T. 300.

In *Walmsley v. Milne*, 7 C. B. N. S. 115, the owner of land mortgaged it, and afterwards erected buildings on it, to which, for the more convenient use of the premises in his business, he affixed a steam-engine and boiler, a hay-cutter, and corn-crusher, and a pair of grinding-stones. The lower grinding-stone was boxed on to the floor, and the steam-engine and other articles (except the boiler) were fastened by bolts and nuts to the walls and floors, but were all capable of being removed without injury either to themselves or to the premises. Under these circumstances, the court held that all the disputed articles formed part of the freehold,

*Hellawell v.
Eastwood.*

*Walmsley v.
Milne.*

and could not be claimed by the assignees in bankruptcy of the mortgagor, even although, if the relation of landlord and tenant had existed, these articles might have been removed during the term. "Without expressing any opinion on *Hellawell v. Eastwood*," said the court, "it is sufficient to observe that, assuming it to be well decided, it is no authority for holding that the disputed articles in the case at bar are not fixtures forming part of the freehold; for we are of opinion, as a matter of fact, that *they were all firmly annexed to the freehold for the purpose of improving the inheritance and not for any temporary purpose.*"

May be a
question of
fact.

A chattel placed by its owner upon the freehold of another, but severable from it, as a door which may be lifted from its hinges, or a sliding fender used to prevent the escape of water from a mill-stream, does not necessarily become part of the freehold. Evidence is admissible of an agreement that it should remain the property of the original owner; *Wood v. Hewett*, 8 Q. B. 913; *Antrim v. Dobbs*, 30 L. R. Ir. 424; and the ordinary presumption as to ownership may be rebutted by circumstances showing the real intention of the parties; *Lancaster v. Eve*, 5 C. B. N. S. 717.

Holland v.
Hodgson.

In *Holland v. Hodgson*, L. R. 7 C. P. 328, 335, Blackburn, J., in delivering the considered judgment of the Exch. Cham., reviewed most of the cases and laid down the rule thus:—"Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel." This case, and *Sheffield Society v. Harrison*, 15 Q. B. D. 358, *Longbottom v. Berry*, L. R. 5 Q. B. 123, and *Ex p. Astbury*, 4 Ch. 630, are useful illustrations of the application of this rule.

Constructive
annexation.

There are indeed some cases of what is called *constructive annexation*, i.e., cases in which an object, really a chattel, is, for certain purposes, considered annexed to the freehold. Thus in *Liford's Case*, 11 Co. 46 b, 50 b, we find the law laid down as follows:—"It is resolved in 14 H. 8, 25 b, in *Wistow's Case*, that if a man has a horse-mill, and the miller

takes the mill-stone out of the mill, to the intent to pick it to grind the better, although it is actually severed from the mill, yet it remains parcel of the mill as if it had always been lying upon the other stone, and by consequence, by lease, or conveyance of the mill, it shall pass with it;" (see the judgment in *Walmsley v. Milne*, 7 C. B. N. S. 138). "So too of doors, windows, rings, &c. The same law of keys: though they are distinct things, they shall pass with the house."

Such too are heirlooms; 11 Vin. Abr. 167; *Petre v. Heneage*, 12 Mod. 520, 1 L. Raym. 728; *Pusey v. Pusey*, 1 Vern. 273; charters, and evidences attendant on the inheritance; *Lord v. Wardle*, 3 B. N. C. 680; and the deer and fish in a man's park or fish-pond; *Liford's Case*, *supra*; Shep. Touch. 470. (As to deer, see also, *ante*, vol. i., p. 430.)

Yet in these cases of constructive annexation, the articles constructively annexed do not acquire *all* the incidents of realty; for instance, trover may be brought for them like other chattels. Yet it is laid down by Lord Coke, that "if a man be seised of a house, and possessed of divers heirlooms, that by custom have gone with the house from heir to heir, and by his will deviseth away the heirlooms, this devise is void;" Co. Litt. 185 b; see Woodeson's Lec. 380; Com. Dig., *Biens*, H.; Hargrave's note, Co. Litt. 18 b; 1 P. Wms. 730; for the custom vests the property in the heir instantly on the testator's death, whereas the will has no effect till the first moment afterwards.

This seems the proper place for mentioning that, in calculating the rateable value of property, machinery attached to it ought to be taken into account without considering whether it be real or personal estate so as to be liable to a distress or a fi. fa., or whether it would belong to the landlord or tenant, heir or executor; *R. v. Guest*, 7 A. & E. 951; *R. v. Lee*, L. R. 1 Q. B. 241; *Laing v. Bishopwearmouth*, 3 Q. B. D. 299; *Tyne Boiler Works Co. v. Longbenton*, 18 Id. 81, where the last-mentioned case was followed, and *Chidley v. West Ham*, 32 L. T. 486, was explained upon the facts; *Gifford v. Chard Union*, 63 L. T. 249. In *Robinson v. Learoyd*, 7 M. & W. 48, however, the value of steam power communicated from an adjacent engine by a shaft revolving on the premises was excluded in assessing their double value, under 4 Geo. 2, c. 28, against a tenant holding over.

Setting the above cases of constructive annexation, which

Heirlooms.

Charters attendant on inheritance.

Deer and fish.

Do not acquire all incidents of realty.

Devise away of heirlooms void.

Fixtures included in rateable value.

General rule.

are comparatively unimportant, and on which few practical questions arise, completely out of view, the general rule is, that to constitute an article *a fixture*, i.e., part of the realty, it must be actually annexed thereto; and *e converso*, whatever is so annexed becomes part of the realty, and the person who was the owner of it, when a chattel, loses his property in it, which immediately vests in the owner of the soil; *quicquid plantatur solo solo cedit*; see Co. Litt. 53 a; *Dearden v. Evans*, 5 M. & W. 11; and *per Parke, B.*, in *Minshall v. Lloyd*, 2 M. & W. 450; but in *Wake v. Hall*, 8 App. Cas. 195, 203, Lord Blackburn expressed the opinion that this rule is much too broadly stated, even as a general rule.

There are, however, cases in which things annexed to the freehold may be disannexed and carried away by some person claiming a property in them as against the owner of the freehold. It is as a leading authority on questions of this sort that the case reported in the text is chiefly celebrated.

Lord Ellenborough, as will have been seen, divides these questions into three classes.

1. Between heir and executor.
2. Between executor and remainderman, or reversioner.
3. Between landlord and tenant.

We will consider these, and some others not noticed in the text, beginning with the most extensive class, viz., that of questions arising *between landlord and tenant*.

1. Rule as between landlord and tenant.

1. The general rule governing this subject is, that the tenant, if he have affixed anything to the freehold during his term, cannot again remove it without the consent of his landlord; see Co. Litt. 53 a: and *per Kindersley, V.-C.*, *Gibson v. Hammersmith R. Co.*, 32 L. J. Ch. 337. Inasmuch, however, as a tenant for years was not punishable for waste, before the statute of Gloucester, neither the rule nor its exceptions could have been of much consequence previous to that period. After the passing of that Act, questions between landlord and tenant occasionally arose in actions of waste, and an opinion was soon expressed by the court, that a lessee engaged in trade, who had set up fixtures for the purpose of carrying that trade on advantageously, had, in some cases, a right to remove them at the expiration of his term.

Exception in favour of trade.

Case in Year-book.

This seems to have been mooted in Year-book, 42 E. 3, fo. 6, pl. 19; but is first expressly laid down in 20 H. 7, fo. 13, pl. 24, as follows: "*Si le lessee pur ans fait ascun furneis*

pur son avantage, ou dier fait des fats et vaissels pur occuper son occupation, durant le terme il peut remuer eux. Mes s'il souffert eux etre fixes al terre apres le fin del' terme, donq ils appent al' lessor. Et sic d'un baker. Et n'est ascun Waste ne remuer tiels choses deins le terme." In this case not only was the exception in favour of traders' fixtures pointed out, but also the limitation in point of time, which still prevails, and obliges a tenant, who has a right to remove fixtures, to do so during his term. Mr. Amos (ed. 3, p. 45) contends that this case establishes an exception in favour of other fixtures set up by lessees for years, besides trading fixtures, and he argues that the words *si le lessee a fait ascun furneis pur son avantage*, must be taken to mean, if the lessee have set up any furnace for his pleasure, and he cites a book entitled "*Un abridgement de tous les ans du Roy Henri le Sept,*" where the words "*pur son plesure*" are substituted for "*pur son avantage*;" but this abridgment is scarcely to be relied on, for it omits the subsequent words *pur occuper son occupation*, which are very important to the question. There certainly appears to be some improbability in the idea of the lessee having put up a furnace in his house for pleasure. Besides, Co. Litt. 53 a, is express that, in ordinary cases, a furnace could not be removed; and, if it were removable in all cases, why should the words *pur son avantage* have been added at all.

Suggestion of Mr. Amos.

This is, however, merely matter of curiosity, for the law respecting the tenant's right to remove fixtures was not long allowed to depend upon decisions in the Year-books, and his privilege of removing trade fixtures was firmly established by *Poole's Case*, 1 Salk. 368, where it is laid down by Lord Holt, "that during the term a soap-boiler might well remove the vats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any special custom) in favour of trade, and to encourage industry. But, after the term, they become a gift in law to him in the reversion, and are not removable." This case was followed by many others, asserting the same exception, and grounding it on the same reason, namely, the encouragement afforded to trade by public policy; see *Lawton v. Lawton*, 3 Atk. 13; *Lawton v. Salmon*, 1 H. Bl. 259 n, recognised in *Mansfield v. Blackburne*, 6 B. N. C. 426; *Penton v. Robart*, 2 East, 88; *Dean v. Allalley*, 3 Esp. 11; *Trappes v. Harter*, 3 Tyrwh. 603; and the text. In *Petrie v. Dawson*, 2 Car. & K. 138, Cresswell, J., held that a rever-

Exception of trade fixtures established by subsequent cases.

sionary interest in trade fixtures would pass by a parol agreement.

Fire-engine.

Dutch barn.

Shed, posts,
and rails.

Lime-kiln.

Special
custom.

Rule that
principal
thing be not
destroyed by
accessory.

The benefit of this exception was held, in *Lawton v. Lawton*, to apply to a fire-engine erected under a shed, and incapable of removal without considerable injury to the freehold: in *Dean v. Allalley*, 3 Esp. 11, to a shed set up for trading purposes, called a *Dutch barn*, having a foundation of brick-work and uprights fixed in and rising from the brick-work and supporting the roof which was composed of tiles and sides open: in *Fitzherbert v. Shaw*, 1 H. Bl. 258, to a shed built on brick-work, and to posts and rails (but see *ante*, p. 196). From *Penton v. Robart*, 2 East, 88, as explained by Mr. Amos, little more can be certainly collected than that Lord Kenyon at *nisi prius*, and the court afterwards, thought that the mere erection of a chimney would not prevent the right, which would have otherwise existed, of removing the surrounding building. In *Thresher v. E. L. Waterworks Co.*, 2 B. & C. 608, the question was discussed, whether the tenant could remove a lime-kiln substantially built of brick and mortar at the cost of 160*l.*, and having its foundations let into the ground. The case, however, turned upon other points. Brick buildings with foundations built into the soil, erected for trade purposes, were held to be removable; *Wake v. Hall*, 8 App. Cas. 195; *Ward v. Dudley*, 57 L. T. 20; but see *Whitehead v. Bennett*, 27 L. J. Ch. 474.

It sometimes happens that the tenant's right does not depend altogether on the general law, but is extended by a special custom or *lex loci*; see *Culling v. Tufnal*, B. N. P. 34, *per* Treby, C. J.; *Lawton v. Salmon*, 3 Atk. 15 n, *per* Lord Mansfield; *Watherell v. Howells*, 1 Camp. 227; *Davis v. Jones*, 2 B. & Ald. 165; *Trappes v. Harter*, 3 Tyrwh. 603.

To whatever extent the right to remove trade fixtures may be carried, common sense and justice seem to require that it should be bounded by the rule laid down by Lord Hardwicke in *Lawton v. Lawton*, viz., that the principal thing "shall not be destroyed by the accessory." It may perhaps be deduced from this, that, if a trading fixture could not be removed without the destruction or great and serious injury of some important building, it would be irremovable. But when the building is but an accessory to the fixture, such as an engine-house, and built to cover it, there we have the authority of the text, p. 195, for saying that one as well as the other is removable.

The principal case shows that the tenant's privilege with respect to fixtures set up for trading purposes, does not, at common law, extend to those set up for agricultural purposes. Some very sensible observations on this point are to be found in the work of Mr. Amos (ed. 3, p. 76), who argues with great force that the opinion expressed by Lord Ellenborough in the text, p. 197, viz., that the doctrine sought to be established by the defendant "was contrary to the uniform current of legal authorities," can hardly be maintained; and that the rule laid down by his lordship is liable to this further objection, that it has a tendency to confine the privilege of the tenant within narrower limits than are designated by the policy to which it owes its existence; and there seems no good reason for conferring it on trade to the exclusion of husbandry, a pursuit equally advantageous to the community, and which is now, like manufactures, often carried on by the aid of valuable machinery. Even if the privilege be confined to *trade*, still many of the occupations of the agriculturist are *trades*, using that word in its extended sense, not in the narrow and technical one which it expresses in the older Bankruptcy Acts.

How far
exception
extends to
agricultural
fixtures.

The opinion that *trade* ought, with reference to the subject now under discussion, to bear this more extended sense, is countenanced by *Lawton v. Lawton*, 3 Atk. 13; and *Dudley v. Warde*, Amb. 113, in which Lord Hardwicke appears to have considered the privilege in question as belonging to fixtures by means of which the owner carried on a species of trade by which he rendered the produce of his own land available to his own profit.

Of a somewhat similar description are the cases of nurserymen and gardeners, who may remove trees, shrubs, and other produce of their ground, planted by them with a view to sale (*Penton v. Robart*, 2 East, 88; *Wyndham v. Way*, 4 Taunt. 316; *Wansbrough v. Maton*, 4 A. & E. 884; and *R. v. Otley*, 1 B. & Ad. 161), which ordinary tenants cannot do (*Empson v. Soden*, 4 B. & Ad. 655). In *Penton v. Robart*, this privilege was considered to extend to greenhouses and other similar erections. "Shall it be said," asked Lord Kenyon, "that the great gardeners and nurserymen in the neighbourhood of this metropolis, who expend thousands of pounds in the erection of greenhouses and hothouses, &c., are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees or such as are likely to become

Nurserymen.

Penton v. Robart, greenhouses.

such, by the thousand, in the necessary course of their trade? If it were otherwise, the very object of their holding would be defeated;" 2 East, 90. Lord Ellenborough, however, in the principal case, disapproved, as will have been seen, of such an extension; see, too, *Buckland v. Butterfield*, 2 B. & B. 58, *per* Dallas, C. J.

Right to remove agricultural fixtures extended by stat. 14 & 15 Vict. c. 25.

Agricultural Holdings Act, 1883, s. 4.

Upon the whole, the extent of the tenant's right with respect to agricultural fixtures, does not seem, even as yet, quite defined. It is clear that it does not go beyond, and, unless the opinion expressed by Lord Ellenborough in the principal case be modified, it falls considerably short of, his rights with respect to trading fixtures. Modern statutes, however, have extended the right to remove agricultural and trading fixtures. By 14 & 15 Vict. c. 25, s. 3, it is provided that when a tenant of a farm or land, with the written consent of his landlord, erects any *farm building*, either detached or otherwise, or puts up any other *building, engine, or machinery*, either for agricultural, or for agricultural and trade purposes, such buildings, etc., are his property and removable by him though built in or permanently affixed to the soil. The tenant must restore the landlord's land or buildings to the same condition as before. Before removal a month's notice must be given to the landlord who may then elect to purchase. The Agricultural Holdings Act, 1883, which applies to holdings wholly agricultural, or wholly pastoral, or partly agricultural and as to the residue pastoral, or wholly or partly cultivated as a market garden, provides, by s. 34, that when a tenant affixes to his holding any *engine, machinery, fencing or other fixture*, or erects any *building*, for which he is not under this Act or otherwise entitled to compensation, such fixture or building is the property of, and removable by, the tenant before and within a reasonable time after the termination of the tenancy, if not affixed or erected in pursuance of an obligation or instead of a fixture or building of the landlord. The tenant must pay all rent and satisfy all obligations in respect of the holding before removal; he must not in the removal do any avoidable damage to the holding; he must make good all damage done to the holding by removal; he must give a month's written notice to the landlord before removal; and the landlord may, before the expiration of the notice, elect to purchase.

This section differs from s. 53 of the Agricultural Holdings Act, 1875, by including "buildings" and by omitting the provisions as to steam-engines.

With respect to fixtures put up for purposes of *ornament* or *convenience*, Lord Holt had, in *Poole's Case*, 1 Salk. 368, expressly denied the right of the tenant to remove them; and a similar doctrine had been laid down long before in *Herlakenden's Case*, 4 Co. 64, though denied in *Squier v. Mayer*, 2 Freem. 249. Whether the opinion of Lord Holt expressed in *Poole's Case* was or was not warranted by the old authorities, it is now settled that there are many ornamental fixtures which the tenant is entitled to remove. Such are hangings and looking-glasses; *per cur.*, *Beck v. Rebow*, 1 P. Wms. 94; tapestry and iron backs to chimneys, for the executor is entitled to these as against the heir; *Harvey v. Harvey*, 2 Str. 1141; and the tenant's privileges against the landlord are more extensive; *per Gibbs, C. J., Lee v. Risdon*, 7 Taunt. 191: wainscot fixed only *by screws*, and marble chimney-pieces; *per Lord Hardwicke, Lawton v. Lawton*, 3 Atk. 15; *Ex p. Quincy*, 1 Atk. 477; and *per Lord Mansfield*, 1 H. Bl. 260, *in notis*; stoves and grates fixed into the chimney with brickwork, and cupboards supported by holdfasts; *per Bayley, J., R. v. St. Dunstan*, 4 B. & C. 686. A post windmill resting by its own weight upon brick pillars was held removable; *R. v. Londonthorpe*, 6 T. R. 377.

Ornamental fixtures.

Hangings and looking-glasses.

Tapestry, iron backs to chimneys.

Wainscot fixed by screws.

Stoves.

Cupboards.

In *Grymes v. Boweren*, 6 Bing. 437, the tenant was permitted to remove a pump which was attached to a stout perpendicular plank resting on the ground at one end, at the other fastened to the wall by an iron pin which had a head at one end, and a screw at the other, and went completely through the wall: "The article," said Tindal, C. J., "was one of *domestic convenience*, was slightly fixed, erected by the tenant, and could be removed entire." In *Buckland v. Butterfield*, 2 B. & B. 54, the court refused to extend the privilege of ornamental fixtures to a conservatory erected on a brick foundation fifteen inches deep, attached to the wall of the dwelling-house by cantilevers let nine inches into the wall, connected with the parlour chimney by a flue, and having two windows in common with the dwelling-house, or to a pinery erected in the garden on a brick wall four feet high. The court said that it was "clear on the one hand that many things of an ornamental nature may be in a degree affixed, and yet during the term may be removed; and, on the other hand, equally clear that there may be that sort of fixing or annexation which, though the thing annexed may have been merely for ornament, will yet make

Grymes v. Boweren.
Pumps.*Buckland v. Butterfield.*

Conservatory.

the removal of it waste ;” that “ *every case of this sort must depend on its special and peculiar circumstances ;*” and that no case had extended the privilege so far as to include the case then under consideration. See *West v. Blakeway*, 2 M. & Gr. 729. In *Wilde v. Waters*, 16 C. B. 637, it was held that trover would not lie for a ladder, a crane, and a bench, which had been left upon the premises by an outgoing tenant, and had been fastened to the floor, joists, and walls with nails and screws in the usual way, because they were not chattels.

Mr. Amos remarks that *Buckland v. Butterfield* may be considered as the leading case upon the subject of ornamental fixtures.

Wainscot
without
screws.

Whether wainscot fixed without screws can be removed, may, perhaps, be questionable. Lord Hardwicke thought it could, but said it was a very strong case, and many of the older authorities are the other way.

Amos, four
points which
affect re-
movability of
ornamental
fixtures.

This subject is discussed in Amos (3rd ed., 125—6), where four circumstances are pointed out as mainly essential to be regarded wherever the question is whether a fixture of an ornamental nature be removable. 1. The mode in which and the extent to which it is united with the premises. 2. Its nature and construction ; as whether it appear to have been intended as a temporary or as a permanent improvement. 3. Whether its removal is likely to occasion any, or any considerable, damage to the freehold. 4. Whether there is any custom or prevalent usage applicable to the case in question.

Bishop v.
Elliott.

In *Bishop v. Elliott*, 10 Exch. 496, 11 Id. 113, where a question arose as to the construction of a covenant to deliver up premises, *with all fixtures and articles in the nature of fixtures belonging thereto*, some important observations were made in the Exch. Cham. with reference to the principle upon which the right of a tenant to remove ornamental fixtures depends. After referring to the conflicting opinions of Lord Holt and Lord Hardwicke, which are mentioned above, and to the judgment of Lord Mansfield in *Lawton v. Salmon*, 1 H. Bl. 260, the court proceeded as follows :—“ It does not appear to us at all difficult to reconcile the difference which may appear in these authorities, nor to extract the principle which is to be gathered from them. Considering that the law has been regularly and gradually relaxing its rule as to the removability by tenants of fixtures erected by them, the difference between Lord Holt and Lord Hardwicke is explained by the difference of time. Lord

Holt was speaking of the rule unrelaxed; and when Lord Hardwicke spoke of chimney-pieces being removable generally, without any qualification as to their material or ornamentation, it cannot be supposed that he intended to lay down the rule more broadly than he did in a later case (*Lawton v. Lawton*, 3 Atk. 13), when he spoke in more qualified terms of marble chimney-pieces, or than Lord Mansfield, when he used the same qualified terms still later (in *Lawton v. Salmon*, 1 H. Bl. 260). Nor, on the other hand, would it be reasonable to suppose that the latter intended to limit it to marble chimney-pieces, merely as such, without reference to the expense and artistic skill employed upon them. Both, no doubt, had in their minds the same principle which the later cases expressly bring forward, that of their being ornamental. In all these cases, no doubt, the same principle was intended to be laid down, which is more formally and precisely stated by Dallas, C.J. (in *Buckland v. Butterfield*, 2 B. & B. 54). It is a matter of common knowledge, that a century ago marble chimney-pieces of ordinary grain and plain workmanship were by no means so commonly used in middle-rate houses as now; while chimney-pieces of foreign marbles and workmanship, highly sculptured, and of much expense, were objects much esteemed, and often erected in houses of a higher description. Where these had been substituted by the tenant for a chimney-piece of wood or stone, it was but a reasonable relaxation of the strict rule of law to allow their removal during the term. Of chimney-pieces such as these, it seems to us that Lord Hardwicke and Lord Mansfield intended to speak. And when Lord Ellenborough goes more into detail, by his classing them under 'matters of ornament,' and with 'pier-glasses, hangings, and wainscot fixed only by screws, and the like,' he marks distinctly both the principle and the limit of the relaxation. Indeed, it would be very unreasonable to hold that a chimney-piece of the plainest workmanship and most moderate expense, however affixed, might be removed merely because it was of polished limestone, and therefore denominated marble, but that one of granite or freestone, however wrought, and at whatever expense, or of wood, however skilfully carved, might not."

It has been already observed, that in the very first case which established the tenant's right to remove fixtures under any circumstances, a limitation to the time during which that right endures was pointed out. That limitation still

Limitation of
time for
removing
fixtures.

exists, and was asserted in *Lyde v. Russell*, 1 B. & Ad. 394. In the Year-book, 20 H. 7, 13, the rule, as will be recollected, is laid down thus : “ *During his term he may remove them, but if he suffer them to remain fixed after the term, they belong to the lessor ;* ” and the same rule with respect to time is laid down in *Poole’s Case*, and several other cases ; *Ex. p. Quincy*, 1 Atk. 477 ; *Dudley v. Warde*, Ambl. 113 ; *Lee v. Risdon*, 7 Taunt. 188, 191 ; *Buckland v. Butterfield*, *supra* ; *Lyde v. Russell*, *supra* ; *Weeton v. Woodcock*, 7 M. & W. 14 ; *Roffey v. Henderson*, 17 Q. B. 574 ; *Pugh v. Arton*, 8 Eq. 626 ; and the principal case, *ante*, p. 194.

Enlarged in
Penton v.
Robart.

In *Penton v. Robart*, 2 East, 88, this rule was somewhat enlarged, for, in that case, it was decided that a tenant who had remained in possession after the expiration of his term had a right to take away fixtures which he might have removed during his term. “ He was, in fact,” said Lord Kenyon, “ still in possession of the premises at the time when the things were taken away, and therefore there is no pretence to say that he had abandoned his right to them.”

Principle of
rule.

These words, perhaps, cast some light on the principle which governs this subject. It will be remembered that the words of Lord Holt in *Poole’s Case* are : “ *After the term they become a gift in law to him in the reversion, and are not removable.* ” It would seem, therefore, that the landlord’s right to them depends upon a presumption of law that the tenant, quitting the premises at the expiration of the term, and leaving the fixtures behind him, intended to bestow them on his landlord, to whom they become a gift in law ; and this, like some other legal presumptions, is perhaps not capable of being rebutted ; but *Penton v. Robart* may be

Presumption
of gift by
tenant.

Arises when ?

thought to show that the presumption of gift arises, not immediately on the expiration of the term, but on the tenant’s quitting the premises, leaving the fixtures behind him. It must, however, be admitted that in the report of the same case at *nisi prius*, 4 Esp. 33, Lord Kenyon said : “ Where the tenant has by law a right to carry away any erections or other things on the premises which he has quitted, the inclination of my mind is, that he has a right to come on the premises for the purpose of taking them away.” This doctrine seems, however, to assume that a tenant who has quitted the premises may still retain a right to the possession of the fixtures, which is the very point in dispute. Mr. Amos observes that the true ground on which *Penton v. Robart* was decided may have been that the things carried

away were *mere chattels*, but the facts stated in the report do not appear to warrant such an explanation.

The extension of the tenant's right allowed in *Penton v. Robart* is qualified by the expressions in the judgment in *Weeton v. Woodcock*, 7 M. & W. 14. "The rule," said Alderson, B., "to be collected from the several cases decided on this subject seems to be this: that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant." See *Barff v. Probyn*, 73 L. T. 118.

Qualified by
Weeton v.
Woodcock.

In *Leader v. Homewood*, 5 C. B. N. S. 546, a tenant remained upon the demised premises for some days after the expiration of his term. He then left the premises, and a new tenant was let into possession, after which the outgoing tenant attempted to re-enter, to remove some fixtures. The court was of opinion that he had no right to do so. "It is perhaps not easy," said Willes, J., in delivering the judgment of the court, "to understand fully what is the exact meaning of the rule laid down in *Weeton v. Woodcock*, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing fixtures during the time he continues in possession as such tenant. But the rule, whatever its exact meaning may be, is plainly inconsistent with the argument relied on in the present case, *viz.*, that the right of the tenant continues till he has evinced an intention to abandon his right to the fixtures. . . . It is unnecessary to consider the import of the rule with reference to the right of a tenant at sufferance during the continuance of such tenancy; because the landlord, in the present case, had re-entered, and thereby put an end to the tenancy before the outgoing tenant attempted to enforce his right."

Leader v.
Homewood.

It has been observed that the presumption which arises on a tenant's abandoning the possession is, *perhaps*, not capable of being rebutted. Still, it has never been determined what might be the effect of a formal declaration on quitting, that he did not intend to give them to his landlord; see *Davis v. Jones*, 2 B. & Ald. 165. It would, however, probably be held inoperative on the principles explained by Tindal, C.J., in *Marston v. Roe*, 8 A. & E. 14, 59.

Whether pre-
sumption of
gift by tenant
can be re-
butted.

Neither has it ever been decided upon solemn argument whether a tenant whose interest is uncertain in point of duration may not have some period after the expiration of

Time for
removing
fixtures after
expiration of

tenancy of
uncertain
duration.

Wansbrough
v. Maton.

Right of
removal must
be exercised
within a
reasonable
time.

Special
agreement.

Custom.

Fairburn v.
Eastwood.

his tenancy allowed him for the removal of his fixtures; and, indeed, the case of emblements and one or two other analogies afford reason for believing that such a distinction would be established in his favour. It has never been determined *upon solemn argument*, but the point might have been involved in *Wansbrough v. Maton*, 4 A. & E. 884. There, a tenant for lives whose interest had expired, and who had quitted the premises, recovered in trover a wooden barn, which rested by its own weight on a stone foundation. This case is, however, *really* open to the observation which has (though, perhaps, groundlessly) been made on *Penton v. Robart*, viz., that the barn was not a fixture, but a mere chattel, and the decision appears to have proceeded on that ground alone.

Supposing a tenant whose interest is of uncertain duration to have a right to remove fixtures after it has expired, it is clear, from *Weeton v. Woodcock*, 7 M. & W. 14, that such right must be exercised *within a reasonable time*; *Stansfield v. Portsmouth*, 4 C. B. N. S. 120; *Moss v. James*, 38 L. T. 595; *Wake v. Hall*, 8 App. Cas. 195. Where, by the terms of the demise, the tenant is entitled to remove tenant's fixtures, and the landlord gives notice of his intention to re-enter for a forfeiture, the tenant has a *reasonable time* from the receipt of the notice for their removal; *Sumner v. Bromilow*, 34 L. J. Q. B. 130. The assignee of fixtures removable by a tenant has a reasonable time to remove them after he has received notice of a surrender of the tenancy; *London and Westminster Loan Co. v. Drake*, 6 C. B. N. S. 798; *Saint v. Pilley*, L. R. 10 Ex. 137.

But, whatever may be the precise limitation where the parties are silent, it is clear that they have a right to fix one for themselves by special agreement; see *Naylor v. Collinge*, 1 Taunt. 19; *Penry v. Brown*, 2 Stark. 403; *Thresher v. East London Waterworks Co.*, 2 B. & C. 608; *Mansfield v. Blackburne*, 6 B. N. C. 426; *West v. Blakeway*, 2 M. & Gr. 729; *Foley v. Addenbrooke*, 13 M. & W. 174; *Wood v. Hewett*, 8 Q. B. 913; and it may be questionable whether such a stipulation might not be created by implication from the custom of a particular district; see *Wigglesworth v. Dallison*, ante, vol. i., p. 528.

In *Fairburn v. Eastwood*, 6 M. & W. 679, the lease contained a covenant that the fixtures should be valued to the landlord at the end of the tenancy. The tenant having become bankrupt, and the landlord to whom the premises

had been delivered up having refused to pay the amount of the valuation to the assignees, it was held that they might maintain trover against him for the fixtures. This case appears to have proceeded on the principle, that, as the landlord by the terms of the covenant was entitled to the possession of the fixtures on condition of his paying for them, it would have been inconsistent with that stipulation to hold that he could retain them after breaking that condition. The case is, therefore, one in which the ordinary rule was qualified by express agreement.

It must further be remarked that, unless *Penton v. Robart* be considered as overruling *Fitzherbert v. Shaw*, it must be taken with the important qualification established by that case, *viz.*, that, where the tenant's continuance in possession is under a new lease or agreement, his right to carry away the fixtures is determined, and he is in the same situation as if the landlord, being seised of the land together with the fixtures, had demised both to him; *Fitzherbert v. Shaw*, 1 H. Bl. 258, recognised in *Heap v. Barton*, 12 C. B. 274.

In *Lyde v. Russell*, 1 B. & Ad. 394, which was an action of trover for bells, pulls, cranks, wires, &c., hung by a yearly tenant at his own expense, the landlord, *after the tenant had quitted*, took down the bells, and refused to deliver them to the tenant, unless he would pay 6*l.* which he claimed for rent. The tenant was held not entitled to recover. This case, with which, although the judgment is not long, Lord Tenterden is said to have taken great pains, goes a step further than any prior decision, for it shows that on the tenant's quitting the land the property of fixtures vests so completely in the landlord, that even though they are subsequently severed and made chattels the tenant's right to them does not revive. It seems to have been admitted that the bells were fixtures for domestic convenience, which the tenant might have removed during his term.

In the following cases covenants and contracts limiting the right to remove fixtures and articles of a similar kind have been construed; *Foley v. Addenbrooke*, 13 M. & W. 174; *Bishop v. Elliott*, 10 Exch. 496, 11 Id. 113; *Sumner v. Bromilow*, 34 L. J. Q. B. 130; *Dumergue v. Rumsey*, 2 H. & C. 777; *Duke of Beaufort v. Bates*, 31 L. J. Ch. 481; *West v. Blakeway*, 2 M. & Gr. 729; *Burt v. Haslett*, 18 C. B. 162, 893; *Bidder v. Trinidad Co.*, 17 W. R. 153; *Cosby v. Shaw*, 23 L. R. Ir. 181.

Where an underlessee covenanted to deliver up all land-

Where tenant continues under new agreement.

Lyde v. Russell.

Trover held not maintainable by tenant for fixtures severed after he had quitted.

lord's fixtures at the end of the term, it was held that there was no implied covenant or representation by his lessors either that he should be at liberty to remove trade fixtures, or that they had not entered into any covenant inconsistent with that right; *Porter v. Drew*, 5 C.P.D. 143. Where the tenant has by his lease given up the ordinary right to remove tenant's fixtures, they cannot be taken by the sheriff in an execution against him; *Dumergue v. Rumsey*, 2 H. & C. 777.

No relaxation when owner of chattel is also owner of fee.

It must be observed that all the cases mentioned above, in which the ancient rule of law with reference to the articles affixed to the freehold has been relaxed in favour of trade, are cases in which the relation of landlord and tenant existed. The same principles are not applicable where the owner of the chattel affixed is also the owner of the fee; see *per* Wood, V.-C., in *Mather v. Fraser*, 2 K. & J. 536; *Walmsley v. Milne*, 7 C. B. N. S. 115, and *post*, p. 218.

Bequest by owner of leasehold.

A bequest by the owner of a leasehold house of the "household furniture" therein will not, except under special circumstances, carry fixtures removable by the tenant; *Finney v. Grice*, 10 Ch. D. 13.

2. Rule as between executors of tenant for life and remainderman.

2. The next class of cases consists of those in which the question is *between the personal representatives of tenants for life or in tail, and the remainderman or reversioner*. The indulgence extended to the executors and administrators of these persons is not so great as that granted in the case of landlord and tenant, and, therefore, though it may be safely assumed that any fixture removable as between the particular tenant's representative and the remainderman would be so as between landlord and tenant, yet the converse is by no means true, the privileges in the latter case being more extensive; and therefore it is that the cases of *Lawton v. Lawton*, 3 Atk. 13, and *Dudley v. Warde*, Amb. 113, which really belong to the class which we are now considering, have been cited as authorities applicable to the former class.

Tenant's representatives entitled to trade fixtures.

Those cases, coupled with the observations of Lord Mansfield in *Lawton v. Salmon*, 1 H. Bl. 260, and of Lord Ellenborough in the principal case, show that the representative of the particular tenant is entitled, as against the remainderman, to fixtures erected wholly or in part for the furtherance of trade, and, as the remainderman is less favoured by law than the heir, any decision in favour of the executor of the ancestor against the heir would *à fortiori* be applicable to a case arising between the executor and the remainderman;

Ward v. Dudley, 57 L. T. 20. Now, there are some cases in which the executor has been permitted to remove even *ornamental* fixtures as against the heir; *Harvey v. Harvey*, 2 Str. 1141; *Squier v. Mayer*, 2 Freem. 249; see *Beck v. Rebow*, 1 P. Wms. 94. But these cases do not go far, for the articles there given up to the executor seem to have been very slightly annexed to the freehold, and rather *chattels* than *fixtures* properly so called; see *D'Eyncourt v. Gregory*, 3 Eq. 382.

Ornamental
fixtures.

There is one case in which the question arises, not precisely between the executor of tenant for life and the remainderman, but between the executor of a parson or other ecclesiastical corporation sole and his successor. In such a case, as the chattels of a corporation sole pass to the executor, he may be entitled to certain matters of ornament, such, for instance, as hangings; see 4 Burn, Eccl. L. (9th ed.) 413; Gibs. 752. The ornaments of a bishop's chapel indeed are the subjects of a peculiar rule: they are in the nature of heirlooms, and pass to the successor; *Corven's Case*, 12 Co. 106; see *Howley v. Knight*, 14 Q. B. 240.

Executor of
parson and
successor.

Ornaments
of bishop's
chapel.

3. *As between Heir and Executor*.—This is the class in which the privilege of removal is most limited, the heir being a greater favourite of the law than the remainderman. The rule, as laid down in Sheppard's Touchstone, 469, 470, is that the executor shall not have "the *incidents* of a house, as glass, doors, wainscot, and the like, no more than the house itself; nor pales, walls, staulks," . . . "tables dormant, furnaces of lead and brass, and vats in a brew- and dye-house, standing and fastened to the walls, or standing in or fastened to the ground in the middle of the house (though fastened to no wall), a copper, or lead fixed to the house, the doors within and without that are hanging and serving to any part of the house." . . . "But if the glass be from the windows, or there be wainscot loose, or doors more than are used that are not hanging, or the like, these things shall go to the executor or administrator," and this will be found consonant with the other *ancient* authorities; see Wentw. Exors. 62; Com. Dig. *Biens*, B.; 3 Bac. Abr. 63; 11 Vin. Abr. 166.

3. As between
heir and
executor.

Modern authorities seem to have somewhat relaxed the strictness of this rule, so far as *fixtures* partly or wholly essential to trade are concerned. Thus, in a case before Comyns, C.B., mentioned in *Lawton v. Lawton*, 3 Atk. 14, the executor recovered from the heir a cider-mill, let into

Strict rule
relaxed by
modern cases
as to trade
fixtures.

Cider-mill. the ground and affixed to the freehold; and Buller, J., considers the cider-mill as on a footing in this respect with other trading fixtures of the same sort, as "brewing-vessels, coppers, and fire-engines;" B. N. P. 34.

Cases opposed to relaxation. Yet in *Lawton v. Salmon*, 3 Atk. 15 n., Lord Mansfield refused to extend the privilege to salt-pans, though the freehold would not have been injured by their removal, saying that the inheritance, as had been proved, could not be enjoyed without them; and he spoke doubtingly of the authority of the case of the cider-mill. In the expressions of Lord Hardwicke, in *Dudley v. Warde*, and *Ex p. Quincy*, 1 Atk. 477, and in B. N. P. 34, the existence of any privilege as against the heir in respect of trading fixtures seems to be denied; see, too, Lord Ellenborough's expressions in the principal case. In *Fisher v. Dixon*, 12 Cl. and F. 312, a Scotch case, but decided upon the principles of English law, it was held that colliery machinery, erected on the lands for their better enjoyment by the absolute owner, passed to the heir, whether obtaining the heritage by descent or purchase, as part of the realty, although portions thereof were capable of being detached without injury to the freehold; and in *Bain v. Brand*, 1 App. Cas. 762, the decision was similar; see, too, *per Wood, V.-C.*, in *Mather v. Fraser*, 2 K. & J. 536.

Ornamental fixtures. With respect to *ornamental* fixtures, it has been already stated that the cases of *Squier v. Mayer*, 2 Freem. 249, and *Harvey v. Harvey*, 2 Str. 1141, were between heir and executor. In the former, hangings nailed to the walls, and a furnace fixed to the freehold and purchased with the house, were given to the executor, and the authority of *Herlaken-den's Case*, 4 Rep. 62, to the contrary denied. In the latter, hangings, tapestry, and iron backs to chimneys, were recovered by the executor in trover; it would, however, be difficult to support the case on any ground, except that the articles recovered were looked upon as mere chattels, for fixtures cannot be recovered in an action of trover; *Colegrave v. Dias Santos*, 2 B. & C. 76; *Minshall v. Lloyd*, 2 M. & W. 450; *Mackintosh v. Trotter*, 3 Id. 184; *Wilde v. Waters*, 16 C. B. 637.

Conflict of authority as to rights of executor. In *Beck v. Rebow*, 1 P. Wms. 94, a covenant to convey a house and *all things affixed to the freehold thereof* was held not to include hangings and looking-glasses fixed to the walls with nails and screws, *which were as wainscot, there being no wainscot underneath*. A contrary opinion had been

expressed the year before in *Cave v. Cave*, 2 Vern. 508, with respect to *pictures put up instead of wainscot*, Lord Keeper Wright thinking that they belonged to the heir, for *that the house ought not to come to him maimed or disfigured*; see *D'Eyncourt v. Gregory*, 3 Eq. 382. There is, therefore, some contradiction among the authorities on this subject: and, besides *Herlakenden's Case* and *Cave v. Cave*, *dicta* will be found in modern cases which militate against such an extension of the executor's rights as *Beck v. Rebow* would appear to warrant; see the judgment in the principal case, and in *Lawton v. Salmon*, 1 H. Bl. 260 n.; *Winn v. Ingleby*, 5 B. & Ald. 625; *Colegrave v. Dias Santos*, 2 B. & C. 76; and *R. v. St. Dunstan*, 4 Id. 686.

The rule laid down by Blackstone, J. (2 Bla. Com. 428) is: "Whatever is *strongly affixed* to the freehold, or inheritance, and cannot be severed from thence without violence or damage, *quod ex ædibus non facile revellitur*, is become a member of the inheritance, and shall thereupon pass to the heir;" cf. Spelm. Gloss. 277. See also the judgments in *Hellawell v. Eastwood*, 6 Exch. 295; *Mather v. Fraser*, 2 K. & J. 536; and *Walmsley v. Milne*, 7 C. B. N. S. 115.

4. There is another class of cases in which questions have arisen as to the right to fixtures; *viz.*, *cases between vendor and vendee, mortgagor and mortgagee*. There appears to be no doubt that upon the sale of the freehold, fixtures attached to it will pass in the absence of any express provision to the contrary; *per* Parke, B., in *Hitchman v. Walton*, 4 M. & W. 409; *Ryall v. Rolle*, 1 Atk. p. 175; so also of a leasehold; *Sewell v. Angerstein*, 18 L. T. 300. In *Colegrave v. Dias Santos*, 2 B. & C. 76, the court appears to have considered the rule between vendor and vendee to be the same as that between heir and executor. "In the case of an heir selling a house which descends to him, in the absence of any express stipulation, he would be taken to sell it as it came to him, and the fixtures would pass"; *per* Bayley, J., *ibid.* If, however, there be an express term in the agreement relating to the fixtures, that is of course to be abided by. The words "*fixtures to be taken at a valuation*" are sometimes used; and a learned author is of opinion, that these include such fixtures as would be deemed personal assets between heir and executor; Amos, ed. 3, p. 289.

4. As between vendor and vendee and mortgagor and mortgagee.

Where a house is demised together with the fixtures, the tenant's interest in them is similar to that which he enjoys in respect of trees; and if he sever them, the right of

Interest of tenant in fixtures demised with house.

possession immediately reverts in the landlord, who may bring trover; *Farrant v. Thompson*, 5 B. & Ald. 826; see *Petre v. Ferrers*, 61 L. J. Ch. 426. However, the tenant's interest is sufficient to enable him or his assignee to maintain trover against a wrong-doer who tortiously severs them; *Hitchman v. Walton*, 4 M. & W. 409; *Boydell v. M'Michael*, 1 C. M. & R. 177.

Effect of
mortgage.

As to *Mortgages*, there seems no good reason for saying that a mortgage of land can be construed to pass any different rights with respect to fixtures than a conveyance; *Hitchman v. Walton*, 4 M. & W. 409, 416; *Langstaff v. Meagoe*, 2 A. & E. 167; *Trappes v. Harter*, 3 Tyrwh. 603. The contrary, indeed, was supposed to have been laid down in *Ex. p. Quincy*, 1 Atk. 477; but, as Mr. Amos has shown (ed. 3, p. 300), without any very sufficient reason. The continuing possession of fixtures by a mortgagor, after a mortgage of the land to which they are annexed, cannot be treated as a badge of fraud; *Steward v. Lombe*, 1 B. & B. 506; *Ryall v. Rolle*, 1 Atk. 165; *Minshall v. Lloyd*, 2 M. & W. 450.

Machinery
annexed after
mortgage.

A mortgage of freeholds passes to the mortgagee all fixtures which have been annexed to the property either before the date of the mortgage; *Steward v. Lombe*, 1 B. & B. 506; *Climie v. Wood*, L. R. 3 Ex. 257, 4 Id. 328; *Mather v. Fraser*, 2 K. & J. 536; *Ex p. Cotton*, 2 M. D. & De G. 725; *Holland v. Hodgson*, L. R. 7 C. P. 328; or after that date; *Walmsley v. Milne*, 7 C. B. N. S. 115; *Cullwick v. Swindell*, 3 Eq. 249; *Longbottom v. Berry*, L. R. 5 Q. B. 123; unless, in the latter case, the instrument of mortgage shows that the parties did not so intend; *Waterfall v. Penistone*, 6 E. & B. 876; *Begbie v. Fenwick*, 8 Ch. 1078 (n). So also does a mortgage of leaseholds; *Ex p. Astbury*, 4 Ch. 630; *Meux v. Jacobs*, L. R. 7 H. L. 481; *Tottenham v. Swansea Co.*, 52 L. T. 738; whether by assignment or sub-demise; *Southport Co. v. Thompson*, 37 Ch. D. 64, explaining *Hawtry v. Butlin*, L. R. 8 Q. B. 290. An equitable mortgagee by deposit has the same rights; *Re Lusty*, 60 L. T. 160. The mortgagee has no right to remove and sell the fixtures as chattels unless an intention to that effect is apparent in the mortgage deed; *Hawtry v. Butlin*, *supra*; *Re Yates*, 38 Ch. D. 112; *Southport Co. v. Thompson*, *supra*; *Small v. National P. Bank*, (1894) 1 Ch. 686; *Re Brooke*, (1894) 2 Ch. 600. Where some fixtures are specified in the mortgage it is a question of construction in

each case whether the mortgage passes all fixtures whether specified or not; *Mather v. Fraser*, 2 K. & J. 536; *Haley v. Hammersley*, 30 L. J. Ch. 771; *Southport Co. v. Thompson*, *supra*. Although the mortgagor has attorned tenant to the mortgagee, the latter is entitled to all fixtures including those affixed after the mortgage; *Ex p. Punnett*, 16 Ch. D. 226; but if a mortgagor in possession has let the premises after the mortgage, his tenant has the same right of removal as any other tenant; *Sanders v. Davis*, 15 Q. B. D. 218. Where leaseholds were mortgaged together with present and future machinery, machinery which was subsequently affixed by the mortgagor in possession, for the purposes of his trade, under an agreement with the vendor thereof that it should remain the vendor's property until payment, was held not to pass to the mortgagee before payment and before he took possession; *Cumberland Co. v. Maryport Co.*, (1892) 1 Ch. 415; approved and followed in *Gough v. Wood*, (1894) 1 Q. B. 713; see these cases explained in *Huddersfield Bank v. Lister*, (1895) 2 Ch. 273.

The question, what are fixtures, was frequently discussed with reference to the operation of the Bills of Sale Act, 1854 (now repealed), upon mortgages embracing fixtures; *Boyd v. Shorrocks*, 5 Eq. 72; *Hawtry v. Butlin*, L. R. 8 Q. B. 290; *Ex p. Daglish*, 8 Ch. 1072; *Meux v. Allen*, 22 W. R. 609 (decided apparently under a mistake of fact, see *Meux v. Jacobs*, *supra*); and the rule established under that Act would seem to have been that the terms of the deed itself must be looked at, in order to determine whether the parties themselves intended to constitute the fixtures a distinct security, in which case only would the deed require registration; *Ex p. Barclay*, 9 Ch. 576. The test in these cases has been whether there was or was not a power to sever and sell the fixtures; see *Re Eslick*, 4 Ch. D. 503; *Re Trethowan*, 5 Ch. D. 559.

Fixtures in
bills of sale.

Now, by the Bills of Sale Act, 1878, fixtures when separately assigned or charged, but not fixtures (except trade machinery as therein defined) when assigned together with a freehold or leasehold interest in land or buildings to which they are affixed, are "personal chattels" within the meaning of the Act (s. 4). "Trade machinery" is defined, by s. 5, to be the machinery used in or attached to any factory or workshop, exclusive of the "fixed motive powers," "fixed power machinery," and of the "pipes for steam, gas, or water;" and it is made "personal chattels" for the pur-

Bills of Sale
Act, 1878,
s. 4.

s. 5.

S. 7.

poses of the Act. "Fixtures" are not to be deemed to be separately assigned, though assigned by separate words or with power to sever and sell them, if by the same instrument any freehold or leasehold interest in the premises to which they are affixed is conveyed or assigned to the same person (s. 7).

Effect of
Statute.

The result of this Act is that, in the case of all fixtures, except "trade machinery" as defined by the Act, an instrument which conveys fixtures and also an interest in the land does not require registration; and that, in the case of fixtures which are "trade machinery" within the definition, such an instrument does not require registration when the "trade machinery" passes by virtue of being affixed to the land, and there is no power to sever and sell the same as chattels; *Re Yates*, 38 Ch. D. 112; *Ex p. Moore & Co.*, 14 Id. 379; *Re Lusty*, 60 L. T. 160; *Small v. National P. Bank*, (1894) 1 Ch. 686; *Re Brooke*, (1894) 2 Ch. 600; see *Ex p. Barclay*, 9 Ch. 576. Fixtures, which are excluded from the definition of "trade machinery" in s. 5, are not "personal chattels" within the meaning of the Act for any purpose; *Topham v. Greenside Co.*, 37 Ch. D. 281.

5. As between
assignees of
bankrupts and
other parties.

5. Questions respecting the right to fixtures have also arisen *between the assignees of bankrupts and other parties*. Generally speaking, the assignees of a bankrupt tenant are entitled to whatever interest in the fixtures the bankrupt himself possessed; see *Trappes v. Harter*, 3 Tyrwh. 603; but 6 G. 4, c. 16, s. 72, now repealed, but in substance re-enacted by the 46 & 47 Vict. c. 52, s. 44, entitled them to goods and chattels which he had at the time of bankruptcy in his possession, ordering, or disposition, by the consent and permission of the true owner, and of which he was reputed owner; and it was at one time contended that this enactment might have the effect of entitling them to fixtures. The chief decision on this subject is *Horn v. Baker*, 9 East, 215, which is frequently cited, and so completely falls within the definition of a *leading case*, that it is printed next in this collection. In *Weeton v. Woodcock*, 7 M. & W. 14, a term ceased by proviso on the tenant's bankruptcy, and it was held that the assignee could not justify the removal of a trade fixture after the expiration of a reasonable time for that purpose. Whether they might have removed it within such reasonable time was not decided.

Horn v.
*Baker.**Weeton v.*
*Woodcock.**Stansfield v.*
Mayor of
Portsmouth.

In *Stansfield v. Portsmouth*, 4 C. B. N. S. 120, a lease, which was determinable on the lessee's bankruptcy, provided

that none of the machinery set up on the premises during the term for the purpose of carrying on a particular trade should be removed, but should, on the determination of the lease, belong to the lessors; but that this stipulation should not apply to machinery set up for any other purpose, which might be removed by the tenant during, or at the expiration of, the term. The tenant became bankrupt, and the lessor re-entered. It was held, that the assignees in bankruptcy were entitled to enter upon the premises for the purpose of removing the fixtures other than trade fixtures, and to a reasonable time for that purpose.

After some difference of opinion it was decided that where the trustee of a bankrupt or liquidating tenant disclaimed the lease under the Bankruptcy Act, 1869, s. 23, he could not remove fixtures either before or after the disclaimer, since, by the disclaimer the lease was to be "deemed to have been surrendered" from the date of the adjudication, and the effect of a surrender was to deprive the tenant of any right to remove fixtures subsequently; *Ex p. Stephens*, 7 Ch. D. 127; *Ex p. Brook*, 10 Id. 100; *Ex p. Glegg*, 19 Id. 7. But the law was altered by the Bankruptcy Act, 1883, s. 55. That section makes a disclaimer operate from its date, and provides that a trustee may not disclaim without leave, except in cases prescribed by general rules (certain cases are now so prescribed by r. 320 of the Bankruptcy Rules, 1886 and 1890), and that the court may, before or on granting leave, make such orders with respect to fixtures as it thinks just. The court, in *Re Moser*, 13 Q. B. D. 738, in giving leave to disclaim, directed that the landlord should either take the fixtures at a valuation, or allow the trustee a reasonable time to remove them.

Effect of
trustee's
disclaimer.

When fixtures have passed by a mortgage of the land, the trustee in bankruptcy of the mortgagor is not entitled to the fixtures; *Walmsley v. Milne*, 7 C. B. N. S. 115; but he is entitled to them if they have not passed by the mortgage; *Waterfall v. Penistone*, 6 E. & B. 876.

Where the assignees of a bankrupt lessee severed and sold fixtures which had been assigned to the plaintiff, it was held, in an action of trespass against them, that the proper measure of damages was the value of the fixtures annexed to the premises, inasmuch as they might have sold them with the lease of the house, and so have realised that value for them; *Thompson v. Pettitt*, 10 Q. B. 101; see *Barff v. Probyn*, 73 L. T. 118.

6. As between
heir and
devisee.

6. *As between Heir and Devisee* it is held that, if tenant for life or in tail devise fixtures, his devise is void, he having no power to devise the realty to which they are incident; Shep. Touchst. 469, 470; 4 Co. 62; unless indeed they be such things as would pass to his executor; see, as to what will pass by such a devise as against the remainderman, *D'Eyncourt v. Gregory*, 3 Eq. 382. On the other hand, the rights of the devisee of lands *against the executor* of the devisor would seem, on principle, to be the same as those of the heir in whose place the devisee stands.

7. Miners
working under
customs.

7. In *Wake v. Hall*, 8 App. Cas. 195, miners, working under customs, lawfully erected machinery and buildings accessory thereto on surface land, to the exclusive use of which they were entitled for mining purposes, but the freehold of which belonged to others; the machinery and buildings were attached to the soil, but could be removed without disturbance of the soil amounting to its destruction; they were accessory to the mining operations, and there was nothing to show that they were intended to be irrevocably annexed to the freehold. It was held that the miners might remove them while their interest in the mines continued. Lord Bramwell thought that the miners had a right to remove within a reasonable time afterwards.

HORN v. BAKER.

HILARY, 48 G. 3.—IN THE KING'S BENCH.

[REPORTED 9 EAST, 215 (9 R. R. 541).]

A., B., and C., partners and distillers, occupied premises leased to A. and another, and used in common, in the trade, the stills, vats, and utensils necessary for carrying it on, the property of which stills, &c., afterwards appeared to be in A. On the dissolution of the partnership, which was a losing concern, it was agreed that C. and one J., should carry on the business on the premises; and by deed between the two last and A. it was agreed that A. should withdraw from the business, and permit C. and J. to use, occupy, and enjoy the premises, paying the reserved rent, &c., and the several stills, vats, and utensils of trade specified in a schedule annexed, in consideration of an annuity to be paid by C. and J. to A. and his wife and the survivor; with liberty for C. and J. on the death of A. and his wife to buy the premises for the remainder of A.'s term, and the stills, &c., mentioned in the schedule; and C. and J. covenanted to keep the stills, &c., in repair, and deliver them up at the time, if not bought; and there was a proviso for re-entry if the annuity were in arrear. Under this, C. and J. took possession of the premises, with the stills, &c., and carried on the business as before; and made payments of the annuity, which afterwards fell in arrear; but A.'s widow and executrix, who survived him, did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of C. and J., who continued in possession of the stills, &c., on the premises.

On a question, Whether such stills, vats, and utensils, so continuing in possession of C. and J. the new partners, and used by them in their trade in the same manner as they had been by the former partners, of whom A. the owner was one, passed under the stat. 21 Jac. 1, c. 19, ss. 10 and 11, to the assignees of C. and J. as being in the *possession, order, and disposition* of the bankrupts at the time of their bankruptcy as *reputed owners*? and nothing appearing to the world to rebut the presumption of true ownership in the bankrupts arising out of their possession and reputed ownership (of which reputed ownership the jury are to judge from the circumstances); held,

1. That the stills which were fixed to the freehold did not pass to the assignees under the words *goods and chattels* in the statute.
2. That the vats, &c., which were not so fixed did pass to the assignees, as being left by the true owner in the possession, order, and disposition (as it appeared to the eye of the world) of the bankrupts, as reputed owners.
3. That the case would have admitted of a different consideration if there

had been a usage in the trade for the utensils of it to be let out to the traders; as that might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of them.

THIS was an action to recover in damages the value of the interest which the plaintiff claimed in certain stills, vats, and utensils, which the first count of the declaration stated that she was entitled to, subject to the use thereof by the defendants during her life; and that, being so entitled, and the defendants well knowing the same, they wrongfully and injuriously broke and destroyed part, and sold and disposed of the rest. The second count was in trover for the same goods: to which the defendants pleaded not guilty; and upon the trial before Lord Ellenborough, Ch.J., at the Middlesex sittings after the last Term, a verdict was found for the plaintiff for 1,000*l.*, subject to the following case.

The plaintiff is the widow and executrix of her deceased husband John Horn, who, before and at the time of making the indenture on the 20th March, 1801, after mentioned, was a distiller in Southwark. The defendants are the assignees of Wm. Horn and R. Jackson, who succeeded John Horn in the business of a distiller, and carried on the same until they became bankrupts, as after mentioned. At the time of making the said indenture John Horn held the principal part of the messuages, buildings, and lands whereon he had carried on the business of a distiller in partnership with Robert Horn and William Horn, and whereon there had been erected a rectifying distil-house, under a lease granted to him and R. Jackson (since dead) for a term which expired on the 30th Dec., 1804; and he held other parts of the premises under another lease granted to him and the said R. Jackson, since deceased, for a term which expired on the 24th June, 1805: and he and the said R. Jackson, now deceased, had before held other parts of the premises under a lease for a term which expired on the 25th Dec., 1799. The above-mentioned partnership, which was a losing concern, expired before the making of the indenture hereinafter mentioned; and William Horn, at the time of making that indenture, and at the death of John Horn, was and now is indebted to the estate of John Horn in 500*l.* in respect of their partnership. By indenture dated the 20th March, 1801, between John Horn of the one part, and

William Horn and Rd. Jackson (the bankrupts) of the other ; after reciting the said several leases, and that at the time of making the last lease the said Rd. Jackson (deceased) was in partnership with John Horn ; and that John Horn had lately entered into partnership with Wm. and Robert Horn for a term then expired ; and that since the expiration of the last-mentioned lease the premises therein comprised had been used and occupied by John, Robert, and Wm. Horn, as yearly tenants ; and that the partnership between John, Robert, and Wm. Horn had before the execution of that deed been dissolved by mutual consent ; and that it had been agreed between John Horn of the one part, and Wm. Horn and Rd. Jackson of the other part, that John Horn should withdraw from the business as from the 1st March then instant, in favour of Wm. Horn and Rd. Jackson, and permit them to use, occupy, and enjoy the said distil-house, and other the premises mentioned in the indentures of lease, *and the several vats, stills, and utensils of trade therein or thereon*, which vats, stills, and utensils were specified in the first schedule written under that indenture, in consideration of an annuity of 600*l.* to be paid to John Horn, his executors, &c., during the life of himself and Elizabeth his wife (the now plaintiff) and the life of the survivor, subject to terms and conditions thereafter expressed : and reciting farther, that it had been agreed that the debts due to John, Robert, and Wm. Horn, as late co-partners, and also all the horses, carts, drays, and casks, of the late co-partnership (*except the vats, stills, and utensils* mentioned in the said first schedule), should be valued and purchased by Wm. Horn and Rd. Jackson ; and that a valuation had been made accordingly ; by which it appeared that such debts, and the value of such horses, &c., amounted to 1,815*l.* ; for payment of which a bond had been given by Wm. Horn and Rd. Jackson to John Horn ; and that Wm. Horn and Rd. Jackson, by another bond, had been bound to John Horn in 5,000*l.* conditioned for payment of the annuity of 600*l.* per annum to John Horn for the lives of himself and his wife (the plaintiff), and the survivor ; he, John Horn, in pursuance of the agreement, and in consideration of the two bonds and the covenants and agreements after contained on behalf of Wm. Horn and Rd. Jackson, for himself, his heirs, executors, &c., covenanted and agreed with Wm. Horn

and Rd. Jackson, their executors, administrators, and assigns, that they, *well and truly paying the rents reserved* by the several recited leases, *and performing all and singular the covenants and agreements therein contained* on the lessees' and assignees' parts, and also *duly and regularly paying the said annuity* so secured as aforesaid, should and lawfully might *peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuage, tenement, distil-house, and premises thereby demised and mentioned in a certain deed-poll indorsed on the said first lease, and also the said stills, vats, and things specified in the first schedule*, during the lives of John Horn and Elizabeth Horn, or the survivor, without any let, suit, &c., of John Horn, his executors, &c., or any person lawfully claiming from him, &c. Wm. Horn and Rd. Jackson, by the indenture of agreement, covenanted to pay the rent reserved by the leases, and to perform the covenants. There was also a proviso in that indenture, that, *in case the annuity should be in arrear for two calendar months*, John Horn, his executors, &c., *might re-enter the distil-house and premises, and the same with all and every the stills, vats, and things mentioned in the said schedule have again, repossess, and enjoy as in his former estate, &c.* There was also a covenant, that upon the decease of the survivor of John and Elizabeth Horn, Wm. Horn and Rd. Jackson should be at liberty to purchase the distil-house and premises for the remainder of the term in the leases, and the stills, vats, and things mentioned in the said schedule. And another covenant that Wm. Horn and Rd. Jackson should keep the said stills, vats, and utensils in repair; and in case they should not purchase the same, that they should at the end of the agreement deliver them up to John Horn, his executors, &c., in good condition, reasonable use and wear excepted. (Then followed the schedule referred to of the different stills and vats, numbered in order, and describing the quantity in gallons which each would contain.) The case further stated that Wm. Horn and Rd. Jackson took possession of the premises immediately on the execution of the indenture of agreement, and carried on the trade of distillers, and from time to time paid the interest on the bond and the annuity to John Horn, who died about four years ago, and who by his will gave all his property to his wife, the

plaintiff, and appointed her sole executrix. Since (a) the death of John Horn neither the annuity nor the interest of the bond for 1,815*l.* have been regularly paid; but the plaintiff, as she from time to time was in want of money, and notwithstanding the annuity and interest might not then be due, applied to Wm. Horn and Rd. Jackson, who paid her different sums on account of such annuity and interest, and also by her order occasionally paid sums to various persons for her use, and supplied her with liquors and spirits as she from time to time ordered any, so that there was a running account between them and the plaintiff. The following memorandum was signed by John Horn, and indorsed on that part of the deed in the possession of Wm. Horn and Rd. Jackson: *viz.*, "I the within-named John Horn do hereby undertake and agree to accept and take 500*l.* by equal quarterly payments instead of 600*l.* for the first year's annuity within referred to." To this memorandum there was no date, nor did it appear when it was made. The following indorsement or receipt was also written on the said deed, and signed by the plaintiff as executor of John Horn: *viz.*, "March 1st, 1802. Received of the within-named Wm. Horn and Rd. Jackson 500*l.*, being one year's annuity due from them this day for the purposes specified herein." There was also the following indorsement on the same deed signed by Elizabeth Horn: "March 1st, 1803. Received of the within-named Wm. Horn and Rd. Jackson 600*l.*, being one year's annuity due from them this day for the purposes specified therein." The first memorandum appeared to be in the handwriting of the solicitor who drew the deed: the two last receipts were in the handwriting of Rd. Jackson. For many months previous to the bankruptcy of Wm. Horn and Rd. Jackson the plaintiff found great difficulty in obtaining money from them; and she permitted the annuity and interest to run in arrear; and, *notwithstanding the same were more than two months in arrear*, the plaintiff did not make any claim to *re-enter* the premises, as by the deed she had the power to do: but in May, 1806, brought an action in this court against Wm. Horn and Rd. Jackson to recover the arrears of the annuity, and also to obtain payment of

(a) What follows down to the letter (a) the case after the first argument.
on the next page was added by consent to

the bond for 1,815*l.* and interest; to which action they pleaded eight several pleas, upon seven of which issue was joined: and to the eighth plea Elizabeth Horn demurred: which demurrer was argued, and judgment given for Elizabeth Horn, and notice of trial of the said issues had been given at the time of the bankruptcy; but in consequence thereof that cause was not further proceeded in; and there was due for the arrears of the annuity and interest on the bond for 1,815*l.* at the time of the bankruptcy about 600*l.* (a). In April, 1805, the *plaintiff*, after her husband's death, *renewed the leases of the several premises*. Wm. Horn and Rd. Jackson occupied the premises, with the stills, vats, and utensils thereon, and carried on the trade of distillers from the time of executing the indenture of the 20th March, 1801, to their bankruptcy. A commission of bankruptcy issued against Wm. Horn and Rd. Jackson on the 26th July, 1806, and they were duly adjudged bankrupts on the 28th; and the messenger under the commission immediately took possession of the demised premises, and also of the vats, stills, and utensils then being thereon. The defendants were afterwards chosen assignees, and an assignment of all the estate and effects of Wm. Horn and Rd. Jackson was duly made to them: upon which notice was given by the plaintiff to the defendants that the several vats, stills, and utensils were the property of the plaintiff, subject to the supposed interests of the bankrupts therein. The things mentioned in the deed, and comprised in the first schedule, consist of stills and vats. The (b) stills, five in number, were set in brick-work, and let into the ground. Three vats or worm-tubs were supported by and rested upon brickwork and timber, but were not fixed in the ground. Sixteen other vats stood on horses or frames made of wood, which were not let into the ground, but stood upon the floor (b). The vats were of wood bound round with iron: the stills were of copper, and connected with some of the vats: others of the vats were also connected and communicated with each other by conductors or pipes. Three stills and vats were in the rectifying distil-house. There were also a great number of other vats under the rectifying distil-house; some of which were standing on brick

(a) See note, p. 227.

(b) What follows down to letter (b) was

added by consent to the case after the first argument.

and timber, and others on horses or frames as above; and which were connected with the vats and stills in the rectifying distil-house. Other of the vats stood on horses or frames as above described. All the vats in the rectifying distil-house stood on their ends; as did nine of those under the distil-house: the other vats under the distil-house lay on their sides or bilge. The defendants, contending that the vats, stills, and utensils, in the said first schedule contained, belonged to the bankrupts at the time of their bankruptcy, have sold them as part of the estate and effects of the bankrupts. The plaintiff, contending that the same belong to her as executrix of her late husband by virtue of his will (subject to the use thereof by the assignees in right of the bankrupts during her life), has brought this action to recover in damages the value of her interest therein. The question was, Whether the plaintiff was entitled to recover? it being agreed that if the plaintiff were so entitled the amount of the damages should be settled out of court.

This case was argued in Michaelmas Term last by *Burrough* for the plaintiff, and *Dampier, contra*; and again in this term by *Williams*, Serjt., for the plaintiff, and Sir *Vicary Gibbs*, A.-G., for the defendants. The additions to the case which have been noticed were made between the first and second argument.

For the plaintiff (after stating that the question turned on the stat. 21 Jac. 1, c. 19, ss. 10 and 11), the attention of the court was called to the preamble to the 11th sect. set forth in the conclusion of the 10th; though it was admitted that the modern cases had put a construction upon the enacting clause beyond the particular mischief recited. The statute reciting "that it often falls out that many persons before they become bankrupts do convey *their* goods to *other* men upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose the same as *their own*:" for remedy enacts that "if any person shall become bankrupt, and, at such times as they shall so become bankrupts, shall, by the consent and permission of the true owner and proprietary, have in their *possession, order, and disposition*, any goods or chattels whereof they shall be *reputed owners*, and *take upon them the sale, alteration, or disposition as owners*:" in every such case the commissioners shall have power to sell and dispose the same for the benefit of the creditors, &c.

Giving effect to the words of the preamble, the true object was to deprive particular creditors of their specific lien on goods, which, having been the property of the bankrupt, had been secretly conveyed by him to such creditors, who suffered him still to continue in possession and appear to the world as the owner. That provision was made in the case of bankrupts in order to avoid the doubt which had arisen upon the stat. 13 Eliz. c. 5, (c) against fraudulent conveyances to defeat and delay creditors in general (and which doubt still exists on the statute of Elizabeth), whether it were not confined, as at common law it certainly was, to avoid the conveyance as against those only who were creditors of the party at the time. Wherefore the statute of James extended the provision to all the creditors, as well those who became such afterwards as those who were such at the time of the conveyance. But still, construing the two statutes together, as made *in pari materiâ*, many great lawyers have considered that the preamble in the 10th sect. of the stat. 21 Jac. 1, c. 19, controlled the enactment in the 11th sect., and confined the operation of the statute to cases where the property conveyed to a particular creditor was before that time the property of the bankrupt himself. Of this opinion was Lord Ch. J. Holt, and the Court of K. B. in *L'Apostre v. Le Plaistrier* (d), and Lord C. B. Parker, and Lord Hardwicke in *Ryall v. Rolle* (e): though the contrary has since been held in *Mace v. Cadell* (f). Still, however, the court will not go further than the latter case; nor say that the statute shall attach in every instance where a trader is in possession of another man's goods at the time of his bankruptcy, if he were not held out to the world as the ostensible owner by the real proprietor, as in that case the bankrupt had been; the true owner having there held out the bankrupt as her husband, and having obtained a licence for the public-house where they lived in his name. But taking the preamble not to control the operation of the enacting clause, still, in order to bring the case within that clause, the bankrupts must not only have such goods in their *possession, order, and disposition*, at the time, *by the consent and permission of the true owner*, according to the first part of the clause, but

(c) See *Twyne's Case*, ante, vol. i. p. 1, et notas.

(d) Mich. 1708, cited 1 P. Wms. 318.

(e) 1 Atk. 175, 182; and 1 Ves. 365, 371.

(f) 1 Cowp. 232.

they must also have taken upon them the *sale, alteration, and disposition* of them, as owners, by the same *consent and permission*; for these words run through both parts of the sentence: and it must appear either by the terms of the contract between the bankrupts and the true owner, or by evidence *dehors* of the nature of the property, or of the place or circumstances of the possession, that the owner trusted the bankrupts with the *power of selling, altering, or disposing of the goods as owners*; or that, having the possession, order, and disposition of the goods under such circumstances as might induce the world to believe that they had such a power, the bankrupts did *actually sell, alter, or dispose* of them *as owners*. In *Walker and others, assignees of Bean, v. Burnell* (g), household goods and furniture, which were left by the assignees under the first commission so long as seven years in the bankrupt's possession: yet having been so left for a special *bonâ fide* purpose, in order to assist the bankrupt in settling his affairs, and getting in his effects for the creditors: and the bankrupt not having the disposition of the goods so as to sell them: were decided not to be within the statute of James. It was admitted even in *Mace v. Cadell*, that every instance of a possession of goods of another by a bankrupt at the time of his bankruptcy was not within the statute; but it was said that the cases of factors, executors, trustees, &c., were *excepted* cases: but the words of the 11th clause, if not restrained by the preamble, are general, and would include those which are called *excepted* cases, as well as any others: they are not, therefore, excepted by the statute itself in terms, but only by construction as not falling within the reason of it: the statute only attaching on the possession of goods by the bankrupt when such possession is fraudulent; where the true owner has trusted the bankrupt with the power of selling, altering, or disposing of the goods, as owner. And though, perhaps, the bare fact of the possession of chattels may be *primâ facie* evidence that the possessor is the true owner, and has the power of sale, &c., as owner, yet the contrary may be shown, and that the possession of the bankrupt was *bonâ fide*, and consistent with the right of the true owner. A factor is intrusted with the highest power over the goods, the power of sale; but because it is not *as owner*, but *as factor*, which is consistent with his

possession and with the rights of the true owner, the case is not within the statute. The same may be said of trustees and executors. So here, the bankrupts had "the possession, order, and disposition" of the goods under the indenture, *as lessees* and not *as owners*; and they had not the *sale* or *alteration* of them at all, nor the *disposition* of them *as owners*, so as to affect the property in any way, but only the bare use of them. In some cases the circumstances attending the possession may carry an appearance to the world that the possessor has the sale, alteration, or disposition of the goods, as owner: as where goods usually sold in a shop or warehouse are exposed to view there; and from thence a power to sell, &c., by the consent of the owner who permits this to be done, may be fairly implied: but no such inference can arise here, where some of the vats, &c., were actually fixed to the freehold, and others apparently so, and the rest were used in like manner as those which were fixed, and all of them were numbered. In this case the possession was at least equivocal, so as to let in the truth of the ownership. It was just as likely by the mere view of the things that they belonged to the owner of the premises, as to the traders who were in possession. They all formed one entire apparatus for distilling, part of which was actually fixed to the freehold: and therefore the bare possession and use of them carried no greater evidence of title than the possession of the premises themselves. And on this ground, Buller, J., in *Walker v. Burnell* (*h*), held that the furniture of the house left in the possession of the bankrupt did not pass under the statute. Wherever the contract between the bankrupt and the true owner, to whom the goods originally belonged, has been *bonâ fide*, and not made for the purpose of giving him a false credit, and the bankrupt's possession and mode of using the property was consistent with such contract, the case has never been held to be within the statute. In *Copeman v. Gallant* (*i*), though Lord Cowper considered that the preamble did not restrain the enacting words of the clause: yet he held the case not to be within it in regard that the assignment, which was for payment of the debts of the assignor, was with an *honest intent*. In *Ryall v. Rolle* (*k*), the property, which originally belonged to

(*h*) 1 Dougl. 320.

(*k*) 1 Atk. 165, and 1 Ves. 349.

(*i*) 1 P. Wms. 320, 1.

the *bankrupt*, was by him mortgaged and conveyed at different times to several persons ; he continuing all the time in possession. That was a fraud directly within the express words of the law. In *Mace v. Cadell* (l) there was direct evidence of fraud on the part of the true owner ; she herself having taken out a licence for the public-house, where the goods were in the name of the bankrupt, to whom she said she was married ; and having at first claimed the goods under a bill of sale for him. *Bryson v. Wylie* (m) was decided altogether upon the ground of trick and fraud. There was an open sale of a dyer's plant to the bankrupt, and afterwards a private resale by him ; notwithstanding which he still continued to keep possession upon payment of a pretended rent. *Gordon v. East India Co.* (n) was the case of goods invested by the true owner *in the name* of an officer of one of the Company's ships, as *his* privilege, whose property they appeared to the world to be : and which was therefore calculated to deceive his creditors. So in *Lingham v. Biggs* (o), a creditor, having taken in execution the furniture of a coffee-house keeper, permitted him to remain in possession of it under a rent ; who therefore appeared to the rest of the world to continue the owner of it in the same manner as before, there being nothing done to notify the change of property, which was clearly fraudulent even within the preamble of the statute. But in that case Lord Ch. J. Eyre, speaking of *Bryson v. Wylie* (m), said that notwithstanding that decision he could suppose that a dyer might be in possession of a plant without being the reputed owner. And he also supported the decision in *Collins v. Forbes* (p), which has been questioned (q). But admitting that there were some circumstances of fraud in the last-mentioned case, the principle there established, which has not been questioned, was, that where the bankrupt was in possession of the goods at the time of his bankruptcy, with the consent of the true owner, *bonâ fide*, for a special purpose, beyond which he had not the right of alteration or disposition, it

(l) 1 Cowp. 232.

(m) Hil. 24 Geo. 3, B. R., cited in 1 B. & P. 83.

(n) 7 T. R. 228.

(o) 1 B. & P. 82.

(p) 3 T. R. 316.

(q) By Lawrence, J., in *Gordon v.*

East India Co., 7 T. R. 237, who now again intimated great doubts of that case, as did also Lord Ellenborough. The former referred to Mr. Cullen's observations on that case, which he said were very sensible. Cull., Principles of the Bankrupt Laws, 318.

is not within the statute. The case of *Darby v. Smith* (r) was considered as an absolute sale of the goods by the trustees of the wife and children to the husband, whom they suffered to continue in possession till the day before his bankruptcy without his paying the stipulated instalments. It would have been useless to have discussed any of these cases if the bare act of possession of the goods of another by a bankrupt at the time of his bankruptcy were sufficient to bring a case within the statute. Now here, by the terms of the deed, the bankrupts had no power over the vats, stills, and utensils in their possession, except the use and repair of them as lessees: they had not the general, but only a special *order* and *disposition* of them by the consent of the true owner: and they had no power of *sale*, *alteration*, or *disposition* of them at all *as owners*. But if the consent or permission of the true owner mentioned in the first part of the 11th clause be not carried to the “*sale, alteration, or disposition*” mentioned in the latter part; at least those words must be intended of an *actual sale, alteration, or disposition* of the things by the bankrupt, in order to bind the true owner: for the words of the Act are, “*and take upon them* (the bankrupts) *the sale, &c., as owners;*” which is not pretended to have been done by the bankrupts in this case. Consistently with the deed, the lessees could not even have removed these goods from the premises demised to any other place, without an implied breach of covenant, to be collected from the whole deed; for they were all scheduled and numbered, and let as an entirety; and if displaced, it could not be told how the numbers applied, and the object of numbering them would be defeated.

It was also objected to the plaintiff's title, that the possession of the lessees at the time of their bankruptcy was not consistent with the deed: because they were only to hold so long as they performed the covenants and paid the annuity reserved; and there was a proviso for re-entry in case such annuity was in arrear for two months: and no re-entry had been made, though the annuity was in arrears for a longer time. To this it was answered that the words of the indenture whereby John Horn covenanted that the lessees “performing all and singular the covenants and agreements therein contained, &c., and also *duly and*

(r) 8 T. R. 82.

regularly paying the annuity, &c., should quietly possess and enjoy, &c., the premises, and also the stills, vats," &c., were not words of condition, on the breach of which the lessees were no longer to hold over, but in law were only words of covenant on the part of the lessees, for the breach of which a remedy lay upon the covenant; as was determined in *Hays v. Bickerstaffe* (s). Then, though there was an express power of re-entry, in case of such arrear, yet it could not have been executed under the circumstances; for there was a running account between the parties; the plaintiff having received money on account of the annuity from time to time, and the bankrupts having also paid bills for her; and this account was not liquidated. But to warrant a re-entry there must be a demand of the precise sum due, which could not be told by the plaintiff at the time. Besides, as in case of rent reserved quarterly, when two quarters have elapsed the lessor cannot re-enter for the first quarter, but only for the last; having slipped his opportunity for the other after another quarter has become due; so here the plaintiff could only have re-entered for the last payment in arrear. But supposing in strictness that the plaintiff might have re-entered, yet as it would not have been prudent to do so, she will stand excused for waiving the exercise of an odious right of forfeiture, against which a court of equity would of course have relieved the lessees on payment of the arrears: and this, even since the stat. 4 Geo. 2, c. 28, s. 2, if the application for relief were made within six months (t).

For the defendants, it was contended that the possession of the bankrupts was not consistent with the deed; for by that, in the event which happened of the annuity falling into arrear, the plaintiff was entitled to enter and take possession of the goods in question; instead of which she left them in the possession of the traders, and brought an action for the arrears, which was defeated by their bankruptcy. As to the difficulty of making a demand for the precise sum before re-entry, the strictness of law in that respect only applies to cases of re-entry for non-payment of rent where the demand must be on the land, and not to the repossession of goods for non-payment of an annuity for which they were a security, in which case the demand may be made anywhere. However, if a previous demand of the precise sum

(s) 2 Mod. 34, 5.

(t) *Doe v. Lewis*, 1 Burr. 619.

were necessary, the difficulty of ascertaining it, occasioned by the act of the annuitant herself, would be no reason why, as between these parties, she should be excused for not having made it. If she were entitled to possession under the deed in the event which happened, and by taking the necessary measures, whatever they might be, would have been in possession, the subsequent possession of the bankrupts was against the stipulations of the deed: and this brings the case within *Darby v. Smith* (u), which is very like the present in its circumstances: for there the trustee had a right to enter and repossess himself of the goods, if the stipulated payments were not made; and having neglected to do so, after default made in all but the first instalment, the possession of the bankrupt was held to be within the statute; though as between the parties to the contract the transaction was *bonâ fide*, and no fraud in fact intended. But, admitting that the possession of the bankrupts was in pursuance of the deed, it does not follow that their possession was not within the statute. If this were so, every case of this sort might be taken out of the statute. The possession of a mortgagor of goods is not inconsistent with his title, and yet it has never been doubted since *Ryall v. Rolle* (x) that it was within the statute. It is the *reputed ownership* of the goods in the possession of the bankrupt which brings the case within the express words of the statute, the avowed object of which was to defeat those secret conveyances, by which personal property is secured to particular creditors, while to the eye of the world it is left in the *possession, order, and disposition* of the bankrupt, who by means of it obtains a false credit. It is now fully settled since the case of *Mace v. Cadell* (y) that the preamble does not control the enacting words of the 11th clause of the Act. But it is argued that the bankrupt must not only have the *possession, order, and disposition* of the goods, with the consent of the true owner, but also the power of *sale, alteration, and disposition*, by the same *consent*. Certainly the bankrupt need not have actually sold and delivered the goods; for then the question would never arise, as was observed by Eyre, C.J., in *Lingham v. Biggs* (z); for the Act only gives the assignees of the bankrupt power to appropriate goods *in his possession*. But the same learned Judge

(u) 8 T. R. 82.

(x) 1 Atk. 165.

(y) 1 Cowp. 232.

(z) 1 B. & P. 87.

says that, "if a man be *reputed owner* of the goods, and appear to have the *order and disposition* of them, he must be understood to have taken upon himself the *sale, alteration, and disposition* within the meaning of the statute." Neither could it be the meaning of the statute that the bankrupt should be the true owner of the goods, because as Lord Hardwicke said, in *Ryall v. Rolle* (a), the legislature has explained its sense by putting the words *true owner*, in opposition to the *reputed owner*. Nor could it mean that the bankrupt should have the *power of sale, &c.*, by the *consent of the true owner*: for then his selling or otherwise disposing of them would be no breach of the private contract between them. In every case where any question can arise, the reputed ownership of the bankrupt must be limited, as between him and the true owner, by some secret stipulation abridging the general right of disposition: and it was the very object of the Act to prevent the operation of such secret engagements, which enabled traders to obtain a false credit by means of the apparent or reputed ownership which their visible possession of the goods of others gave them. It is no question, therefore, in these cases what is the real contract in the deed; for that could not be known at the time to third persons who were dealing with the trader. The only question which can be made, consistently with the words and objects of the statute, is, Whether the trader in possession at the time of his bankruptcy had the apparent order and disposition of the goods? If to the eye of the world he appeared to be the owner of them, or was, as the statute calls him, the *reputed owner*, the case is within the statute: though in truth there was a secret conveyance or agreement by which the property was made over or secured to another. This, as was said by Buller, J., in *Walker v. Burnell* (b), must always be more a question of fact than of law. When the fact of the reputed ownership is clearly ascertained, the law follows of course. Every man, says Eyre, Ch.J., in *Lingham v. Biggs* (c), who can be said to be the *reputed owner*, has incidentally the order and disposition of goods; and if he be reputed owner, and appear to have the order and disposition of

(a) 1 Atk. 183.

P. 89.

(b) 1 Dougl. 317; see this noticed by Eyre, C.J. in *Lingham v. Biggs*, 1 B. &

(c) 1 B. & P. 87.

them, he must be understood to have *taken upon himself* the *sale, order, and disposition*, within the meaning of the statute. And if the real owner do not take such means as may be in his power to prevent the public being imposed upon by such false appearance, that is the very mischief meant to be remedied by the Act; and the bankrupt must be taken to have the possession, order, and disposition of the goods by consent of the owner: and the being in possession under such circumstances, from whence the order and disposition of the goods may be reasonably inferred, makes the reputed ownership. Now, here every circumstance of notoriety tended to show that the bankrupts were the true owners of the goods, whether considering the possession before the indenture of the 30th March, the time and circumstances under which the bankrupts took possession under that deed, the avowed purpose for which it was made, or the continued possession and apparent ownership of the bankrupts after the transfer in the same manner as before. William Horn, one of the bankrupts, had been in partnership with John Horn, the testator, before the transfer; they carried on business jointly upon the same premises, and had a joint use of the vats, stills, &c., and to the eye of the world at least the property belonged to the partnership, however it might be as between themselves. Rd. Jackson had also an interest with John Horn in the lease. The business was a losing concern; and John Horn, wishing to get out of it, appeared to the world to withdraw himself from it; and Wm. Horn appeared to continue in possession of the premises, and of the vats, stills, and utensils for carrying on the business, together with Rd. Jackson, and to exercise the same acts of ownership as he had done before when in partnership with John Horn. But in fact John Horn had secretly conveyed this property to Wm. Horn and Rd. Jackson, saddled with the annuity to himself and his wife, which was likely to ruin the trade more rapidly than before. But there was no notice of the change to other persons dealing with the partnership; the deed was kept secret from them; the object of all the parties being, that the trade might be carried on by the existing partners with the same apparent capital as the old firm, and that the credit of the new partnership might not be lessened by the general knowledge of the fact that the goods in question were not their property. The secrecy of the transfer was as much for the

benefit of John Horn as of the continuing partners ; for if their credit were shaken, they would be less able to pay the stipulated annuity. In fact, the bankrupts did gain a false credit by the possession of the goods in question. There is no fact of notoriety to resist the conclusion that these were the goods of the bankrupts ; and the only fact relied on to show that the property was not theirs is the secret indenture of the 20th March, 1801, by which a prior claim on the goods was secured to John Horn ; but such a secret transfer is of the very species of fraud which the statute meant to guard against. The case of *Bryson v. Wylie* (d) cannot be distinguished from this in principle. The bankrupt there had the possession of the dyer's plant, but he had not paid for it : he therefore agreed to assign it to the creditor, and to take it again on lease from him. There was no *mala fides* or fraud in the transaction as between those two ; and if the interest of no other person had been concerned, it was only just and reasonable that the creditor should have had his security ; yet that was avoided by the operation of the statute, as fraudulent in law against the creditors in general. The case of *Darby v. Smith* (e) is strong to the same point. The case of *Walker v. Burnell* (f) turned, as it seems, on the notoriety of the goods which were left in the bankrupt's possession continuing the property of the assignees under the first commission : but that is a very doubtful case. The honesty of the intent of the true owner cannot be sufficient to protect the goods : for according to the report of *Copeman v. Gallant*, in 7 Vin. Abr. 89, Lord Cowper said : " If possession and disposition be given to a person who becomes bankrupt, *though no intent of fraud appear* ; yet, if it give a false credit, there is the same inconvenience as if fraud were intended, &c. ; and it matters not whether it were by fraud, or only by neglect, or out of a humour." And this was admitted in *Bucknal v. Royston* (g) in the case of a bankruptcy.

In the course of the argument, GROSE, J., asked whether there was any usage in the trade for distillers to hire or lease vats, stills, &c., with their premises ? To which it was answered by the defendants' counsel that no such usage appeared ; and unless

(d) Hil. 24 Geo. 3, B. R., cited in 1 B. & P. 83.

(e) 8 T. R. 82.

(f) 1 Dougl. 317.

(g) Prec. in Cha. 287.

it were expressly found by the case, the presumption would be that things necessary to carry on the trade were provided by the traders themselves; and that the possession of such things, which were of great value, must naturally give more credit to the distillers than the mere view of the spirits distilled, which often belonged to others. Lord ELLENBOROUGH, Ch.J., also observed at the conclusion of the argument, that nothing had been said with respect to the distinction between such of the vats and stills as were affixed to the freehold, and those that were movable, and would be the subject of trover; between which, he said, the court thought there was a material distinction; the words of the statute of James being *goods and chattels*. And upon asking the Attorney-General whether he meant to insist upon the right of the assignees to such of the articles as were affixed to the freehold, and referring him to *Ryall v. Rolle*, and being answered in the negative, his Lordship said that, if the rest of the court agreed with him in opinion as to the right of the assignees to such of the articles as properly fell under the denomination of goods and chattels, it would be better to leave it to a referee to ascertain out of court the difference of the value for which the verdict should be entered.

Lord ELLENBOROUGH, Ch.J., then proceeded: The true object of the statute 21 Jac. 1, c. 19, ss. 10 and 11, was to make the *reputed* ownership of goods and chattels in the possession of bankrupts, at the time of their bankruptcy, the *real* ownership of such goods and chattels, and to subject them to all the debts of the bankrupt; considering that such reputed ownership would draw after it the real sale, order, alteration, and disposition of the goods. The stills, it appears, were fixed to the freehold; and as such, we think, would not pass to the bankrupt's assignees under the descriptions of goods and chattels in the statute. But as to the vats and utensils, there is nothing in the case to rebut the reputed ownership following the possession of the bankrupts after the dissolution of the old firm, when the business was continued to be carried on by the bankrupts alone, in the same manner as it followed the possession of the antecedent partnership when the trade was carried on by John, Robt., and Wm. Horn. Before the deed of the 20th March, 1801, though John Horn might have had a priority of claim to the stills, vats, and utensils, as between him and his partners; yet to the eye of the world the

apparent ownership of them was in the partners, John, Robert, and William Horn. After the deed John demised these things to Wm. Horn and Rd. Jackson, who continued to carry on the trade after he had retired from it, finding it to be a losing concern; and, instead of reserving a rent, he reserved an annuity payable to himself and his wife and the survivor of them, with a liberty to the new partners to purchase these articles on the death of such survivor. Under this agreement Wm. Horn and Richard Jackson continued in possession of the property, carrying on the trade in the same manner as was done before; and to the eye of the world the property of these goods appeared to be vested in them in the same manner as it appeared to be in the former partnership. As between the parties to the contract, the new partners could not, indeed, sell, alter, order, or dispose of the property but according to the provisions of that deed: but, as to the world in general, they appeared to have the same right over it which the former partners had. Had they not then the *reputed* ownership? If, as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in this trade for distillers to rent or hire the vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not in such a case have carried the reputed ownership. But, in the absence of such a usage, there is nothing stated in the case which qualifies the reputed ownership arising out of the possession and use of the things in their trade. The world would naturally give credit to the traders on their reputed property; and the person who permitted them to hold out to the world the appearance of their being the real owners ought to be answerable for the consequences, and was so intended to be by the statute. For some time it was *vexata quæstio* whether the preamble controlled the enacting words, so as to confine the operation of the statute to cases where the bankrupt was the original owner of the property conveyed by him to the particular creditor; but the enacting words have been long held not to be so controlled. Here, in fact, the bankrupts were only lessees of these goods; but that was a secret known only to the parties themselves; and nothing appeared to teach the world that the bankrupts could not bind the property to the

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full extent of it. This is a case then which comes within the fair construction of the enacting words. The case of *Bryson v. Wylie* (*h*) bears strongly on the present; for that was not the case of a mortgagor keeping possession of goods, as might be supposed from the note of what was said by Lord Mansfield: but the plaintiff, who was the original owner of the plant, finding that Simpson, to whom he had sold it on the security of two promissory notes, was not able to pay the notes when due, agreed to take back the plant and give up the notes, and to let the plant to Simpson at a rent: under which agreement Simpson continued in possession of it up to the time of his bankruptcy. Mr. Justice Buller there distinguished the case from that of a banker or factor who by the course of trade must have the goods of other people in his possession; and therefore it did not hold out a false credit to the world. He meant therefore to say that where the possession did hold out a false credit to the world, there the statute would follow it, and attach upon the goods. And the cases of *Mace v. Cadell* (*i*), and *Lingham v. Biggs* (*k*), are authorities to the same purpose. The principle to be deduced from all of them is, that where the reputed ownership of the goods in the trader is permitted to be held out to the world, it shall, with respect to the world, be considered as the real ownership. I do not enter into the question whether the bankrupt's possession were consistent with the deed; because that would only apply to the time after which the plaintiff might have re-entered for non-payment of the annuity. Her not doing so might, perhaps, be argued as more distinctly showing her intention to exhibit the apparent ownership of the bankrupts to the world: but I lay no stress on it: for, in my view of the case, however consistent their possession might have been with the deed, it would only have shown that the deed itself was the fraud which the statute meant to guard against. The principle is, that in all cases where, by the consent and permission of the true owner of goods, a trader in possession has the apparent ownership, and incidental to that the order and disposition of them, and no other circumstance appears to control such apparent ownership,

(*h*) Hil. 24 Geo. 3, B. R., cited in
1 B. & P. 83.

(*i*) 1 Cowp. 232.
(*k*) 1 B. & P. 82.

and show that the trader was not the real owner, the true owner permitting the trader to exhibit this appearance does it at his peril.

GROSE, J.—The case of *Mace v. Cadell* (l) has put a construction upon the statute, which has ever since settled that where the real owner of goods suffers a trader to have the reputed ownership, so as to have the apparent order and disposition of them, and the trader becomes bankrupt, the statute gives the property to the assignees for the benefit of the creditors. I only doubted whether the stills which were fixed to the freehold would pass under this statute ; but it is now agreed that they do not. But, with respect to the other articles, it is impossible to distinguish this case in principle from the current of those which have been decided, which have gone upon the ground that where the real owner enables a trader to acquire credit by having the possession and apparent order and disposition of goods with respect to the world, he does in effect permit such trader to take upon himself, and he has with respect to the world, the apparent sale, alteration, and disposition of the goods, within the meaning of the statute.

LAWRENCE, J.—The question in these cases, as was observed by Mr. Justice Buller in *Walker v. Burnell*, (m) is rather a question of fact than of law. And therefore it seems more proper in such cases to leave it to the jury to say whether, under the circumstances, the bankrupt had the reputed ownership of the goods at the time ; for if the true owner suffer a trader to have the reputed ownership of goods left in his possession, and he become bankrupt, the statute says that the property shall go to his assignees. In this case, therefore, we are rather called upon to consider, as upon a motion for a new trial, what conclusion a jury should have drawn from this evidence, than to consider a dry question of law. The facts stated are, that one partner, upon retiring from business, leases to others who continue it (one of whom had been in partnership with him before) certain stills, vats, and utensils proper for carrying on the business, and which had been used by the former partners. The new partners become, in consequence, to the world the apparent owners of the property. It may happen, from the course of certain trades, that masses of

(l) 1 Cowp. 232.

(m) 1 Dougl. 320.

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machinery are let out by the owners to the mechanics engaged in them, and the notoriety of such a usage in the trade may rebut the presumption of ownership which would otherwise arise from the possession ; but in general the possession of utensils of trade must be taken to be by the owners of them. And I agree that nothing turns upon the question whether or not the possession of the bankrupts in this case were consistent with the deed under which they claimed from John Horn : for the very object of the statute was to prevent the true owner from enabling another to hold himself out to the world as such, and thereby gain a false credit : and, this being a secret deed, the world could know nothing of its contents. It was pressed in the course of the first argument that the reputed ownership mentioned in the statute must be understood where there was a power of sale confided to the bankrupt by the true owner ; and reference was made to the words of Lord Mansfield in *Mace v. Cadell* (*n*), that the statute did not extend to all possible cases where one man had another man's goods in his possession, as the case of factors, &c., who have the possession as trustees, &c., *to sell for the use of their principal* : “ but the goods must be such as the party suffers the trader *to sell as his own*.” But this last expression was evidently used in contradistinction to the case of factors, &c., who sold for other persons and not for themselves. And he could not have meant to lay it down generally ; for that was not the case of a sale : but the facts there were, that the owner let the bankrupt into her house, where he passed as her husband : but she never gave him the power of selling the goods, and he never had sold them ; yet by treating him as her husband she had given him the reputation of being the owner of the goods ; which was held to bring the case within the statute. As to the case of *Bryson v. Wylie* (*o*), on which my Lord has observed, Lord Mansfield certainly considered the whole as a trick and contrivance to evade the statute : and what was said by Mr. Justice Buller goes the whole length of our opinion in this case ; that a factor, who must in the course of his business have other persons' goods in his possession, does not thereby gain a false credit ; but that where the conduct of the

(*n*) 1 Cowp. 232.

1 B. & P. 83.

(*o*) Hil. 24 Geo. 3, B. R., cited in

true owner enables another, in whose hands the goods are, to hold out to the world the reputation of ownership, he thereby gives that other a false credit to the extent of the property so confided; for which the statute meant to make him responsible. It is often a question of fact, whether the possession of goods do hold out a reputed ownership in the possessor, as in the case of furniture in lodgings. In the present case the opinion which we have formed from the facts stated will make it necessary to inquire which of these articles are fixtures, and which are not: and for the value of the fixtures when ascertained, and beyond that, for the damage which may have been done to the house in removing the fixtures, the plaintiff will be entitled to recover.

LE BLANC, J.—The question is, Whether the bankrupts having obtained the reputed ownership of the movable utensils of the trade by possession of them before and at the time of the bankruptcy, acquired the real ownership by the statute for the benefit of their creditors? I lay out of consideration the question of re-entry of the plaintiff: for I do not think that it makes any difference in this case. This decision will only be an authority for a case where the bankrupts were in possession of utensils necessary for carrying on their trade under a lease; and where there was no usage of the trade for the trader to have such utensils let to him on hire. Wherever such a usage of trade may prevail, the case may deserve another consideration. I must take it, upon the facts here disclosed, that John Horn was the owner of the utensils in question before the deed of March, 1801; though that fact is very clumsily stated in the case: the court, however, considers that by some means or another, which do not distinctly appear, these utensils were the property of John Horn; and he demised them to the bankrupts, who were to carry on the trade after he withdrew from it; and without these articles they could not have carried on the trade; and there is no usage in the trade for letting such utensils. The question then is, Whether under these circumstances, the bankrupts had the possession, order, and disposition of the goods by the consent of the true owner? I think they had. For though there are many exceptions, as in the case of factors, bankers, lodgers and others who are known to have the goods of other persons in their possession; none of which, it is true, are expressly excepted in the statute;

(LE BLANC, J.)

yet the ground of all the exceptions has been, that the possession of such and such descriptions of persons did not carry to the understanding of the world the reputed ownership. The same rule might extend to furniture let with a house, and perhaps even to furniture let without the house to be used there, where such lettings were usual; and, by a parity of reason, to utensils of trade usually let to the traders; because possession in such cases would not carry the reputed ownership of the property, and would not impose on the world a false appearance of property in the possessor.

The verdict to be entered for the plaintiff for the value of the fixtures only, and the damage done in removing them.

Fixtures not
"goods and
chattels"
within Bank-
ruptcy Act.

ONE of the points decided in this case, *viz.*, that *fixtures*, such as the stills in the text, are not "goods and chattels," within the meaning of the Bankruptcy Act, so as to pass to the assignees (or, now, to the trustee) as goods in the ordering or disposition of the bankrupt, has been affirmed in several subsequent cases. The course of bankruptcy legislation appears to have made no difference in this respect, though some complexity arises from the fact that in the Bills of Sale Acts, both that of 1854, now repealed, and that of 1878, fixtures are included in the term "personal chattels;" see ss. 4, 5, and 7 of the latter Act (*ante*, p. 219), and *post*, p. 252.

Coombs v.
Beaumont

In *Clark v. Crownshaw*, 3 B. & Ad. 804, the decision was expressly founded on the authority of *Horn v. Baker*. In *Coombs v. Beaumont*, 5 Id. 72, it was held that a steam-engine affixed to the freehold for the purpose of working a colliery, and to be used by the tenant during his term, the property remaining in the landlord, did not pass to the tenant's assignees. "The steam-engine," said Parke, J., "if affixed to the freehold, clearly does not pass to the assignees, because it does not come within the description of 'goods and chattels,' in 6 G. 4, c. 16, s. 72. This was determined in *Horn v. Baker*, and since that case, as far as my experience goes, I never knew that any distinction was made between such fixtures as would be removable between landlord and tenant, and such as would not."

In *Boydell v. M'Michael*, 1 C. M. & R. 177, the same doctrine was affirmed and acted upon by the Court of Exch. There, a tenant for years, who had taken the fixtures at a valuation from his landlord, mortgaged the term and fixtures, and afterwards became bankrupt; they were held not to pass to his assignees. "The real nature of the tenant's interest," said Parke, B., "in this case is, that he has a right to remove the fixtures during the term: that interest has been held sufficient to enable the sheriff to seize them under a *fi. fa.*; but *Horn v. Baker* decides that they are not 'goods and chattels' within the meaning of the clause as to the order and disposition of the bankrupt. *The reason is this, that with regard to real property the possession is considered as nothing, but that the title only is looked to.*"

*Boydell v.
M'Michael.*

In *Hallen v. Runder*, 1 C. M. & R. 266, the court thought that fixtures could not properly be denominated *goods* in an *indebitatus* count, though their value might be recovered in a count for fixtures bargained and sold; see *Lee v. Gaskell*, 1 Q. B. D. 700. And in *Minshall v. Lloyd*, 2 M. & W. 450, Parke, B., said: "I assent to the doctrine laid down in *Coombs v. Beaumont*, and *Boydell v. M'Michael*, that such fixtures are not goods and chattels within the meaning of the bankrupt law, though they are goods and chattels when made such by the tenant's severance, or for the benefit of execution creditors."

Fixtures not
"goods"
unless severed.

In *Trappes v. Harter*, 3 Tyr. 603, 2 C. & M. 153 (which is said by Parke, B., in *Minshall v. Lloyd*, 2 M. & W. 450, to have been doubted), trading fixtures were held to pass to the assignees of certain bankrupts, as part of their property, and, the assignees having severed and removed them, it was held that a mortgagee of the premises (the mortgage deed having been decided by the court not to convey these fixtures) could not maintain case against them for injury to his reversion. This decision, it will be seen, is not at all at variance with *Horn v. Baker*. Undoubtedly if the fixtures did not pass by the mortgage deed, the assignees (or now, the trustee) would take them; and whether as personal estate or not seems immaterial. See the note to the report of *Trappes v. Harter*, 2 C. & M. 182; the observations on this case in *Walmsley v. Milne*, 7 C. B. N. S. 115, 133; *Pim v. Grazebrook*, 3 M. & Gr. 863; and *Thompson v. Pettitt*, 10 Q. B. 101.

*Trappes v.
Harter.*

It is conceived that a personal chattel fixed to the freehold in order to the more convenient use of the chattel as

Quære, as to
chattel fixed
to freehold for

more convenient use as such.

such, as was the case with the machine in *Hellawell v. Eastwood*, 6 Exch. 295 (*ante*, p. 199), would not be within the above-mentioned exception of fixtures from "goods" in the reputed ownership section of the Bankruptcy Act.

In *Ex p. Tweedy*, 5 Ch. D. 559, a bankrupt had deposited, by way of equitable mortgage, a deed whereby a lease, and also by distinct words and for a separate consideration, machinery and trade fixtures, had been assigned to him. The mortgagees had suffered him to remain in possession of the fixtures. The point actually decided was, that, without a memorandum duly registered as a bill of sale, the deposit was invalid against the trustee *quâ* the fixtures; but Bacon, C.J., expressed an opinion that, had the objection based upon the Bills of Sale Act, 1854, failed, the fixtures and machinery would have passed to the trustee as being in the order and disposition of the debtor, with the consent of the true owner.

Reputed ownership clause in successive statutes.

The case of *Horn v. Baker* is a useful one on account of the light thrown by the discussion in it on the construction of the reputed ownership clause in the Bankruptcy Act. At the time of the decision, that subject was governed by 21 Jac. 1, c. 19, ss. 10, 11, which were at first so little acted upon, that no case occurred in which their operation was discussed for upwards of a century. S. 10 was a mere recital made by a misprint into a separate section, and gave rise to some doubt, in consequence of its being narrower than the enactment, so that it apparently applied only to property which had once been the bankrupt's; and it was for some time thought that such property only was included in s. 11, an idea which the analogy to the statutes respecting fraudulent conveyances appeared to countenance. These doubts, however, were removed by *Mace v. Cadell*, 1 Cowp. 232; and the obnoxious recital, which was omitted in 6 Geo. 4, c. 19, s. 72, and succeeding Acts, is also omitted in the Bankruptcy Act, 1883, s. 44, by which the subject is now governed. That section, like the corresponding sections of former Acts, is, with some differences to be noted hereafter, substantially identical in form with the enactment of James, the decisions upon which are consequently for the most part authorities on the construction of the present law.

Reputed ownership in Bankruptcy Act, 1883, s. 44, sub-s. 3.

The property dealt with by the reputed ownership clause of the present Act is thus described:—"All goods" (which, by s. 168, include "all chattels personal") "being, at the

commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action, other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section."

Although fixtures, as we have seen, were not within the meaning of the reputed ownership clause, all *personal chattels* fell within it. Ships; *Stephens v. Sole*, 1 Ves. sen. 352; *Atkinson v. Maling*, 2 T. R. 462; *Hay v. Fairbairn*, 2 B. & Ald. 193; *Monkhouse v. Hay*, 2 B. & B. 114; unless, in the transfers by way of mortgage, such transfers had been registered before an act of bankruptcy: Choses in Action, which are now expressly excepted, see *infra*: Furniture; *Lingham v. Biggs*, 1 B. & P. 82: Utensils of Trade; *Lingard v. Messiter*, 1 B. & C. 308 (except when, as hinted in the principal case, there was a usage to demise them to the trader; see *post*, p. 250): were, all of them, if in the possession, ordering, or disposition of the bankrupt, as reputed owner, with the consent of the true owner, at the time of his bankruptcy, held to pass to his assignees, under s. 125 of the Bankruptcy Act, 1849.

What are
personal
chattels.

In *Gibson v. Overbury*, 7 M. & W. 555, a distinction was drawn between the actual paper or other material on which a contract is written, and the benefit of the contract itself, and a pledge was held sufficient to pass the paper on which a policy of insurance was written, although, for want of notice to the office, the right to the money insured remained in the assignees of the bankrupt; see also *Belcher v. Campbell*, 8 Q. B. 1; *Green v. Ingham*, L. R. 2 C. P. 525, where *Gibson v. Overbury* was distinguished.

Distinction
between paper
containing
contract and
benefit of
contract itself.

Choses in action, other than debts due or growing due to the bankrupt in the course of his business, are expressly excluded from the operation of the present Act, as from the previous Act of 1869 (s. 15). Shares in a company were held, in *Ex p. Union Bank of Manchester*, 12 Eq. 354, not to be *choses in action* within this exception, and that decision was followed by the C. A., Fry, L.J., dissenting, in *Colonial Bank v. Whinney*, 30 Ch. D. 261. On appeal, however, this last decision was reversed in the H. L., and such shares were held to be "things in action:" 11 App. Cas. 426; see also *Ex p. Barry*, 17 Eq. 113. A debenture of a com-

Choses in
action.

pany is a chose in action; *Ex p. Rensberg*, 4 Ch. D. 685; and so is a policy of insurance; *Ex p. Ibbetson*, 8 Id. 519; and a share in a partnership; *Ex p. Fletcher*, Id. 218.

Debts due or growing due.

As to what are "debts due or growing due to the bankrupt in the course of his trade or business," see *Ex p. Kemp*, 9 Ch. 383; *Re Davis*, 60 L. T. 156, 157. If they have been assigned, but notice of the assignment has not been given to the debtors, they pass to the trustee in bankruptcy under s. 44, sub-s. 3; *Re Davis*, 60 L. T. 156; *Re Tillett*, 60 Id. 575; *Rutter v. Everett*, (1895) 2 Ch. 872.

"Order and disposition" is a question of fact.

The question whether goods are in the order and disposition of a bankrupt by the consent of the true owner is a question of fact, not of law; *Acraman v. Bates*, 2 E. & E. 456; *Ex p. Emerson*, 41 L. J. Bank. 20; *Ex p. Watkins*, 8 Ch. 520; *Ex p. Murphy*, 31 L. R. Ir. 465. The goods must be in the possession of the bankrupt "under such circumstances that he is the reputed owner thereof."

Customs of trade.

The custom of a particular trade must be taken into consideration. The knowledge or ignorance of an individual creditor, as to the ownership of the goods, is immaterial; but the custom must be such that the ordinary creditors of a debtor must be presumed to have known it; *Ex p. Watkins*, 8 Ch. 520; *Ex p. Vaux*, 9 Id. 602; *Ex p. Lovering*, Id. 621; *Ex p. Powell*, 1 Ch. D. 501; *Ex p. Wingfield*, 10 Id. 595. In the following cases a custom of trade has been proved so as to exclude the reputation of ownership:—As to goods in a bonded warehouse; *Ex p. Watkins*, 8 Ch. 520; *Ex p. Vaux*, 9 Id. 602: the custom of hiring furniture by hotel keepers and other similar persons; *Ex p. Powell*, 1 Ch. D. 501; *Crawcour v. Salter*, 18 Id. 30; *Ex p. Turquand*, 14 Q. B. D. 636; *Re Chapman*, 1 Manson, 415: a custom in the upholstering trade to lend patterns to upholsterers; *Ex p. Woodward*, 54 L. T. 683: a custom in the hop trade for goods to remain in the vendor's warehouse; *Ex p. Dyer*, 53 L. T. 768: a custom in the printing trade to let machinery on hire; *Ex p. Hughes*, 5 M. B. R. 235: a custom among horse-dealers to entrust men with horses on sale or return; *Ex p. Wingfield*, 10 Ch. D. 591: and in the safe trade to send safes to dealers upon sale or return; *Ex p. Poppleton*, 63 L. T. 839: the custom of agistment; *Ex p. Huggins*, 54 L. T. 683; *Re Burke*, 19 L. R. Ir. 564: a custom to let pianos upon hire-purchase agreements; *Ex p. Hattersley*, 8 Ch. D. 601. But in *Ex p. Brooks*, 23 Ch. D. 261, a custom to let furniture on hire-

purchase agreements, and in *Ex p. Nassau*, 3 M. B. R. 51, a custom in the furniture trade to supply goods to retailers upon sale or return, were held not to be sufficiently established.

Goods consigned by manufacturers to their agents for sale, who carried on business as "merchants and manufacturers' agents," were held not to be in the reputed ownership of the agents; *Ex p. Bright*, 10 Ch. D. 566.

Possession of agents for sale.

The doctrine of reputed ownership applies only to goods in the sole possession of the bankrupt as sole reputed owner; *Reynolds v. Bowley*, L. R. 2 Q. B. 41, 474; *Ex p. Dorman*, 8 Ch. 51; *Ex p. Fletcher*, 8 Ch. D. 218. But goods may be in the order or disposition of one partner "in his trade or business," although his business is that of the partnership, and the goods are assets of the firm; *Colonial Bank v. Whinney*, 30 Ch. D. 261, where shares, bought for partnership purposes with partnership funds, were held to be in the order and disposition of the partner in whose name they were registered. The subsequent reversal of the judgment of the C. A., by the H. L., upon other grounds, does not appear to have affected their decision upon this point.

Sole possession of bankrupt.

Partnership property.

Where one of two trustees of goods was in possession thereof in his trade or business, Cave, J., held that they passed, upon his bankruptcy, to his trustee in bankruptcy, under s. 44, sub-s. 3; *Ex p. Slater*, 64 L. T. 426.

A chattel may be in the order and disposition of the bankrupt as reputed owner, though not in his actual possession at the time of the bankruptcy, but in the possession of another person to whom he has lent it upon hire; *Hornsby v. Miller*, 1 E. & E. 192; see also *Freshney v. Carrick*, 1 H. & N. 653.

Chattel lent on hire by bankrupt.

Where the true owner has done all in his power to obtain possession of his property, the presumption of his consent is thereby withdrawn; *Ex p. N. W. Bank*, 15 Eq. 69; *Ex p. Ward*, 8 Ch. 144; and see *Ex p. Montagu*, 1 Ch. D. 554; *Ex p. Phillips*, 4 Id. 496. If the true owner is a person incapable of giving consent, as an infant or a married woman restrained from anticipation, there cannot be such "consent and permission;" *Re Mills*, (1895) 2 Ch. 564.

Where true owner has done everything to get possession; or cannot consent.

Whether goods mortgaged by the bankrupt before the bankruptcy, which have been seized by the sheriff under an execution against the bankrupt, and which are in the possession of the sheriff at the time of the bankruptcy, are in

Goods held by sheriff at date of bankruptcy.

the possession, order, and disposition of the bankrupt with the consent of the true owner, is not clear upon the authorities; see *Fletcher v. Manning*, 12 M. & W. 571; *Barrow v. Bell*, 5 E. & B. 540; *Ex p. Foss*, 2 De G. & J. 230; *Ex p. Edey*, 19 Eq. 264; see also *Meggy v. Imperial Discount Co.*, 3 Q. B. D. 711, 716. It is clear that a seizure under a distress takes them out of the statute; *Sacker v. Chidley*, 11 Jur. N. S. 654; see *Meggy v. Imperial Discount Co.*, *supra*. As to the effect of a receiver appointed by the High Court taking possession, see *Taylor v. Eckersley*, 5 Ch. D. 740; and as to the effect of his appointment, see *Rutter v. Everett*, (1895) 2 Ch. 872.

‘Trade or business.’

The words “in his trade or business,” which are substituted for the words “being a trader” in the Act of 1869, limit the operation of the section; see *Ex p. Lovering*, 24 Ch. D. 31; *Ex p. Nottingham Bank*, 15 Q. B. D. 441; *Colonial Bank v. Whinney*, 30 Ch. D. 261, 11 App. Cas. 426; though the introduction of the words “or business” extends it to a class of persons who, not being “traders,” were not within the former enactment; see *Re Wallis*, 14 Q. B. D. 950; *Re Harrison*, 67 L. T. 600; *Re Cook*, 1 M. B. R. 108.

Order of court unnecessary.

Now, as under the Act of 1869 (ss. 15, 17), property in the reputed ownership of the bankrupt vests in the trustee upon his appointment, without an order of the court, which was necessary before the Act of 1869; see *Heslop v. Baker*, 6 Exch. 740.

Fixtures personal chattels within Bills of Sale Act.

It may be observed here that fixtures were comprised within the words “personal chattels” as used in the Bills of Sale Act, 1854. These words were defined, by s. 7 of that Act, to mean “goods, furniture, *fixtures*, and other articles capable of complete transfer by delivery.”

The Bills of Sale Act, 1878, also includes fixtures, but in a limited sense, as defined by the Act, under the term “personal chattels,” and contains provisions dealing with difficulties which arose in reference to this question under the former Act. (See the notes to *Elwes v. Maw*, *ante*, p. 219.)

It also, by s. 20, excluded from the operation of the reputed ownership clause of the Bankruptcy Act, goods comprised in a bill of sale, duly registered in compliance with its provisions, thereby altering the law as laid down in *Badger v. Shaw*, 2 E. & E. 472, and other cases decided under the former Act; s. 20, however, is repealed by the

Bills of Sale Act, 1882, so far as concerns bills of sale given, since 1st Nov., 1882, by way of security for the payment of money. The result of this repeal is that the reputed ownership clause of the Bankruptcy Act now applies to goods comprised in a bill of sale of that class; but not to goods comprised in valid bills of sale not given by way of security for the payment of money; *Ex p. Izard*, 23 Ch. D. 409; *Swift v. Pannell*, 24 Id. 210; see *Heseltine v. Simmons*, (1892) 2 Q. B. 547, 552.

As to the difference between reputed ownership, and "apparent possession" under the Bills of Sale Acts, see *Ex p. National Assurance Co.*, 10 Ch. D. 408.

GODSALL v. BOLDERO.

MICH. 48 G. 3.—IN THE KING'S BENCH.

[REPORTED 9 EAST, 72.]

A creditor may insure the life of his debtor to the extent of his debt. Such a contract is substantially a contract of indemnity against the loss of the debt: and therefore if, after the death of the debtor, his executors pay the debt to the creditor, the latter cannot afterwards recover upon the policy; although the debtor died insolvent, and the executors were furnished with the means of payment by a third party (*a*).

THIS was an action of debt on a policy of insurance made the 29th Nov., 1803, under seal of the defendants, as three of the directors of the Pelican Life Insurance Company, on behalf of the company; which recited that the plaintiffs, coachmakers in Long Acre, being interested in the life of the Right Hon. William Pitt, and desirous of making an insurance thereon for seven years, had subscribed and delivered into the office of the company the usual declaration setting forth his health and age, &c., and having paid the premium of 15*l.* 15*s.* as a consideration for the assurance of 500*l.* for one year from the 28th Nov., 1803, it was agreed that in case Mr. Pitt should happen to die at any time within one year, &c., the funds of the company should be liable *to pay and make good* to the plaintiffs, their executors, &c., within three months after his demise should have been duly certified to the trustees, &c., the sum of 500*l.* And further, that that policy might be continued in force from year to year until the expiration of the term of seven years, provided the annual premium should be duly paid on or before the 28th Nov. in each year. The plaintiffs then averred, that *at the time of the making of the said assurance, and from thence until the death of Mr. Pitt*, they were

(*a*) Overruled, on the latter point, by *Dalby v. India London Life Insurance Co.*, set out, *post*, p. 262, on the ground

that a life insurance is not a contract of indemnity.

interested in his life to the amount of the sum insured ; and that they duly paid the annual premium of 15*l.* 15*s.* before the 28th Nov., 1804, and the further sum of 15*l.* 15*s.* before the 28th Nov., 1805 ; and that after that day, *and while the assurance was in force, and before exhibiting the bill of the plaintiffs, viz.,* on the 23rd Jan., 1806, Mr. Pitt died ; that his demise was afterwards duly certified to the trustees, &c. ; since when more than three months have elapsed before the commencement of this suit, &c. ; but that the 500*l.* has not been *paid or made good* to the plaintiffs. There were also counts for so much money had and received by the defendants to the plaintiffs' use, and upon an account stated. To this the defendants pleaded, 1st, *nil debent*. 2ndly, that the plaintiffs, at the time of making the assurance, and from thence until the death of Mr. Pitt, were not interested in his life in manner and form as they have complained, &c. 3rdly, as to the first count, that the interest of the plaintiffs in the policy, and thereby intended to be covered, was a certain *debt* of 500*l.* at the time of making the policy due from Mr. Pitt to the plaintiffs, and no other ; and that the said debt afterwards, and *after the death of Mr. Pitt, and before the exhibiting of the plaintiffs' bill, to wit, on the 6th March, 1806, was fully paid to the plaintiffs* by the Earl of Chatham and the Lord Bishop of Lincoln, *executors* of the will of Mr. Pitt. Issues were taken on the two first pleas : and as to the last, the plaintiffs, protesting that their interest in the policy thereby intended to be covered was not the said debt mentioned in that plea to be due to them from Mr. Pitt, and no other, replied, that the said debt was not afterwards, and after the death of Mr. Pitt, and before the exhibiting of their bill, fully paid to them by the Earl of Chatham and the Lord Bishop of Lincoln, *executors* of Mr. Pitt, in manner and form as alleged, &c. : on which also issue was joined.

The defendants paid 31*l.* (b) into court upon the first count ; and on the trial of the cause before Lord Ellenborough, Ch.J., at Guildhall, it was agreed that a verdict should be entered on the

(b) There was some discussion in the course of the argument as to the sufficiency of the sum paid into court, in respect of the premiums received ; the grounds of computing which did not distinctly appear. The defendants'

counsel, however, denied the necessity of paying anything into court, the risk having once commenced ; and ultimately no opinion was given by the court on this point.

several issues, according to the direction of the court, on the following case reserved.

The policy mentioned in the declaration was duly executed, and the premiums thereon were regularly paid. Mr. Pitt, mentioned in the policy, died on the 23rd January, 1806 ; which event was duly certified in February, 1806, to the trustees of the Pelican Life Insurance Company. The defendants, before Trinity Term last, were served with process issued in this cause on the 3rd June, 1806. Mr. Pitt was indebted to the plaintiffs at the time of the execution of the policy, and from thence up to and at the time of his death, above 500*l.*, and died insolvent. On the 6th March, 1806, the executors of Mr. Pitt paid to the plaintiffs, out of the money granted by Parliament for the payment of Mr. Pitt's debts, 1,109*l.* 11*s.* 6*d.*, as in full for the debt due to them from Mr. Pitt. The case was argued in the last term by

Dampier, for the plaintiffs, who contended that they were entitled to recover upon this policy, notwithstanding the payment of the debt to them by Mr. Pitt's executors out of the money granted by Parliament for that purpose. It is clear that a creditor has an insurable interest in the life of his debtor, and the amount of the debt is the measure of that interest ; and so far the existence and legality of the debt (*c*) is necessary to the validity of the insurance in point of interest under the stat. 14 Geo. 3, c. 48 : but it is not the *debt* *quâ* *debt* which is insured, but the *life* of the debtor : it is only necessary that the interest should exist at the time of the insurance made, and continue up to the time of the death of the debtor, as it did in this case ; and the sum insured having then become due, and the debtor's estate insolvent, the fact of payment of the debt afterwards by a third party cannot be material ; such payment being altogether gratuitous. The validity of the insurance depends upon its agreement with the stat. 14 Geo. 3, c. 48, which was made to prevent "insurances on lives or other events wherein the assured shall have no interest ;" and for this purpose it enacts (s. 1) "that no insurance shall be made by any persons on the life of any person, &c., wherein the persons, for whose use, benefit, or on whose account such policy

(*c*) *Dwyer v. Edie*, London sittings 914 ; and 2 Marsh. on Insur., 3rd ed., after Hil. 1788 ; Park on Insur., 8th ed., 779.

shall be made, shall have no interest, or by way of gaming or wagering ; ” and it avoids every assurance made contrary to the true intent and meaning thereof. The 2nd section prohibits the making any policy on the life of any person without inserting in it the person’s name interested therein. And the 3rd section provides “ that in all cases where the insured hath interest in such life, &c., no greater sum shall be recovered from the insurers than the amount or value of the interest of the insured in such life, &c.” Now here it cannot be disputed but that all the requisites of the Act have been complied with. The only question which can be made is upon the 3rd section, as to the necessity of the interest continuing beyond the time of the event happening on which the insurance is stipulated to be paid, and to the commencement of the action. But the interest need only continue up to the happening of the event insured, when the cause of action arises ; and that is the usual averment in actions of this sort : and the defendants by their third plea admit that it continued beyond that time ; for they allege that the debt was paid *after* Mr. Pitt’s death, though before the action commenced. But, if it had been necessary that the interest should endure up to the time of the action brought, that should have been averred : which has not been usual ; and for want of which the judgments in former cases might have been arrested. The hazard was run for which the premium was received, during Mr. Pitt’s life ; and as he died insolvent, there was then as it were a total loss : then the underwriters’ liability cannot be adeemed by the voluntary payment of a third party, though through the hands of the debtor’s executors. The very payment of the premium gave the plaintiffs an interest in the policy : and it could not have been in the contemplation of the Legislature, when they granted the money for the payment of Mr. Pitt’s debts, to adeem the risk of underwriters. In the case of insurances against fire, it never was conceived that the insurers could avail themselves *pro tanto* of charitable donations collected for the benefit of the sufferers. In the case of a life insurance, the premium is not calculated upon the risk of the insolvency of the person whose life is insured, but solely on the probability of the duration of the life. But, if the defendants’ objection be well founded, every case of this sort will be resolved into an examination of the assets : of which the

insurers will avail themselves *pro tanto*, after having had the benefit of the whole premium; and this, too, at any distance of time when assets may be forthcoming after the payment of the loss. But, secondly, by the payment of money into court the defendants admit a continuance of the plaintiffs' interest in the policy beyond the amount of the bare debt; for it was paid in after the liquidation of the debt, and after the action commenced. And, therefore, the plaintiffs would be entitled to recover something. And it does not appear how the premiums received have been reduced to the amount paid into court.

Marryat, contra, said that he should not now dispute the proposition that a creditor might insure the life of his debtor since the statute; though it might have been doubted, at first, whether such an interest as that in the life of another were within the contemplation of the Legislature. There was an inception of the risk on the policy; and therefore the premium was properly paid; and no question can arise on the amount of it; this being an insurance on a precise sum, like a valued sea policy. The only question is, Whether, in the event, the plaintiffs have been damnified, and can call upon the assurers for any indemnification? To pursue the metaphor, the ship insured has been wrecked, but there has been a salvage, which the underwriters were entitled to, and out of which the assured have been indemnified; notwithstanding which, they still claim as for a total loss, contrary to the very nature of the insurance, which is only a contract of indemnity. Admitting that the general form of the declaration in these cases may have been such as is stated, still it is competent for the underwriters to show that a salvage has been received by the assured to the whole extent of their loss; and in no case can an assured recover double satisfaction, whether from the same or any other person; as in the case of a double insurance; and therefore it is immaterial in this case from what hand the first satisfaction came. This principle was fully admitted in the case of *Bird v. Randall (d)*, where it was applied to a case much stronger than the present. For there a servant having entered into articles to serve his master for a certain time under a penalty, and the servant having left his service before the time by the procurement of the defendant, this court, in an

(d) 3 Burr. 1345, 1 W. Bl. 373, 387; see 14 Q. B. D. 147.

action by the master to recover damages against the seducer, held that the master's having before sued the servant, and recovered the penalty against him before the action brought against the seducer (though in fact the penalty recovered was not received till after the second action commenced, but before trial), was a bar to such further remedy ; considering the amount of the penalty as ample compensation for the injury received ; and that no further satisfaction could be received from any other quarter.—[Lord ELLENBOROUGH, C.J. I never could entirely comprehend the ground on which that case proceeded. It was assumed that the sum taken as the penalty from the servant was the extreme limit of the injury sustained by the master ; but there is the doubt, for the penalty might have been so limited, because of the inability of the servant to undertake to pay more ; and yet it might have been very far from an adequate compensation to the master for the injury done to him by another who seduced his servant from him. I remember, however, a similar case tried at the sittings in the Court of Common Pleas, before Mr. Justice Wilson, sitting for the Chief Justice, who ruled the same point upon the dry authority of the former decision : but, as it seemed to me at the time, with considerable doubt upon his mind as to the propriety of it.—LAWRENCE, J. I suppose the Court proceeded upon the ground that the penalty was, by the express stipulation of the parties, made an equivalent for the loss of the service.—Lord ELLENBOROUGH. That is so as between the parties themselves ; but it may admit of doubt, whether that were the fair way of considering it as against a stranger, a wrong-doer.] A voluntary payment of another's debt, if accepted as such, will protect the debtor : and, if so, it will equally protect an insurer under the statute. For the object of that was to prevent wager policies ; but if this policy may be enforced, notwithstanding payment of the debt, every creditor may gamble upon the life of his debtor by way of insurance, though without any reason to doubt of his solvency ; and upon his death he would be entitled to double satisfaction of his debt. If a payment out of the debtor's assets would have been a bar to this action, it cannot enter into the merits of the case to inquire by whose assistance the executors have been enabled to make the payment. The money was paid by them, and received by the plaintiffs, as for the *debt* of Mr. Pitt.

Then, secondly, the payment of money into court on the first count only admits the contract declared on. It admits that the plaintiffs had an interest in the policy up to the death of Mr. Pitt, but not at the time of the action brought: and where a demand is illegal on the face of it, payment of money into court does not admit it (*e*). (It was afterwards stated by the Court, and agreed on all hands, that the payment of money into court on the first count only admitted the *facts* stated in that count.)

Dampier, in reply, on the principal question, said that the facts of the case showed that this was not a wagering policy; but that the plaintiffs had an interest in it up to the extent of the sum insured. And he denied that the subsequent payment of the debt out of the grant of Parliament was like the case of salvage on a marine policy; for that was an advantage calculated upon by the underwriters in fixing the amount of the premium; but here the solvency of the debtor formed no basis of the calculation, but only the probable duration of his life. In *Bird v. Randall* (besides the doubt of the soundness of that decision), the penalty was considered as liquidated damages to the full extent of the injury: and the judgment recovered was considered as a satisfaction in law. If, in this case, the plaintiffs, after recovering judgment against the underwriters, had attempted to sue Mr. Pitt's executors, the cases would have been more alike. This stands as the case of a *gratuitous* payment by third persons of the debt of another, and not as the satisfaction of a legal demand, nor upon a stipulation to receive it as satisfaction of the present claim. It is most like the case of a charitable donation to sufferers by fire who were partially insured.

Cur. adv. vult.

LORD ELLENBOROUGH, C.J., now delivered the judgment of the Court.

This was an action of debt on a policy of insurance on the life of the late Mr. Pitt, effected by the plaintiffs, who were creditors of Mr. Pitt for the sum of 500*l*. The defendants were directors of the Pelican Life Insurance Company, with whom that insurance was effected. (His lordship, after stating the pleadings and the case, proceeded)—This assurance, as every

(*e*) *Cox v. Parry*, 1 T. R. 464; and *Ribbans v. Crickett*, 1 B. & P. 264.

other to which the law gives effect (with the exceptions only which are contained in the 2nd and 3rd sections of the stat. 19 Geo. 2, c. 37), is in its nature a contract of *indemnity*, as distinguished from a contract by way of *gaming* or *wagering*. The interest which the plaintiffs had in the life of Mr. Pitt was that of creditors; a description of interest which has been held in several late cases to be an insurable one, and not within the prohibition of the stat. 14 Geo. 3, c. 48, s. 1. That interest depended upon the life of Mr. Pitt, in respect of the means, and of the probability of payment which the continuance of his life afforded to such creditors, and the probability of loss which resulted from his death. The event against which the indemnity was sought by this assurance, was substantially the expected consequence of his death as affecting the interests of these individuals assured in the loss of their debt. The action is, in point of law, founded upon a supposed damnification of the plaintiffs, occasioned by his death, existing and continuing to exist at the time of the action brought: and being so founded, it follows, of course, that if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. Pitt, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails. And it is no objection to this answer, that the fund out of which their debt was paid did not (as was the case in the present instance) originally belong to the executors as a part of the assets of the deceased; for, though it were derived to them *aliunde*, the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the assurance contract is alone maintainable, was fully obviated before their action was brought. This is agreeably to the doctrine of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1210 (*f*). The words of Lord Mansfield are: "The plaintiff's demand is for an *indemnity*: his action then must be found upon the nature of the *damnification*, as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss, when the event has decided that the damnification in truth is an average, or

(*f*) A case of marine insurance

(Lord ELLENBOROUGH, Ch.J.)

perhaps no loss at all.” “Whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms, to bring an action for *indemnity*, where upon the whole event *no damage* has been sustained.”

Upon this ground, therefore, that the plaintiffs had in this case no subsisting cause of action in point of law, in respect of their contract, regarding it as a contract of *indemnity*, at the time of the action brought, we are of opinion that a verdict must be entered for the defendant on the first and third pleas, notwithstanding the finding in favour of the plaintiffs on the second plea.

After having been treated as law, not only in this country, but in the United States of America, for a great number of years, during which it was frequently referred to by judges of eminence without disapprobation, *Godsall v. Boldero* was overruled by the unanimous decision of six judges sitting in the Exchequer Chamber, in *Dalby v. India and London Life Assurance Co.*, 15 C. B. 365. The judgment delivered in the latter case was as follows:—

DALBY v. THE INDIA AND LONDON LIFE ASSURANCE COMPANY.

[REPORTED 15 C. B. 365.]

THE judgment was delivered December 2nd, 1854, by PARKE, B., and the facts of the case, as well as the reasons upon which the decision proceeded, are fully stated therein. “This case,” said his Lordship, “now comes before us on a bill of exceptions to the ruling of my Brother Cresswell at *nisi prius*. We learn that on the trial he reserved the important point which arose in it for the consideration of the Court of Common Pleas; and that when it came on for discussion it was thought right to put it on the record in the shape of a bill of exceptions, that it may be carried, if it should be thought proper, to the highest tribunal, and we have now, after a very able argument on both sides, to dispose of it in this court of error. It is an action on what is usually termed a policy of life assurance, brought by the plaintiff, as a trustee for the Anchor Assurance Company, on a policy for 1000*l.* on the life of his late Royal Highness the Duke of Cambridge. The Anchor Life Assurance Company had insured the duke’s life in four separate policies—two for 1000*l.* and two

for 500*l.* each—granted by that company to a Mr. Wright. In consequence of a resolution of their directors, they determined to limit their insurances to 2000*l.* on one life; and this insurance exceeding it, they effected a policy with the defendants for 1000*l.* by way of counter-insurance. At the time this policy was subscribed by the defendants, the Anchor Company had unquestionably an insurable interest to the full amount. Afterwards an arrangement was made between the office and Mr. Wright, for the former to grant an annuity to Mr. Wright and his wife, in consideration of a sum of money, and of the delivery up of the four policies to be cancelled, which was done; but one of the directors kept the present policy on foot by the payment of the premiums till the duke's death. It may be conceded, for the purpose of the present argument, that these transactions between Mr. Wright and the office totally put an end to that interest which the Anchor Company had when the policy was effected, and in respect of which it was effected, and that at the time of the duke's death, and up to the commencement of the suit, the plaintiff had no interest whatever. This raises the very important question, whether, under these circumstances, the assurance was void, and nothing could be recovered thereon. If the Court had thought some interest at the time of the duke's death was necessary to make the policy valid, the facts attending the keeping up of the policy would have undergone further discussion. There is the usual averment in the declaration that, at the time of the making of the policy, and thence until the death of the duke, the Anchor Assurance Company was interested in the life of the duke; and a plea that they were not interested '*modo et formâ*,' which traverse makes it unnecessary to prove more than the interest at the time of making the policy, if that interest was sufficient to make it valid in point of law. (*Lush v. Russell*, 5 Exch. 203.) We are all of opinion that it was sufficient, and but for the case of *Godsall v. Boldero*, 9 East, 72, should have felt no doubt upon the question. *The contract commonly called 'life assurance,' when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life; and when once fixed it is constant and*

invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same on the other. *This species of insurance in no way resembles a contract of indemnity.* Policies of assurance against fire and against marine risks are both properly contracts of indemnity, the insurer engaging to make good, within certain limited amounts, the losses sustained by the insured in their buildings, ships, and effects. Policies on maritime risks were afterwards used improperly, and made mere wagers on the happening of those perils. This practice was limited by the 19 G. 2, c. 37, and put an end to in all except a few cases; but at common law, before this statute with respect to maritime risks, and the 14 G. 3, c. 48, as to insurances on lives, it is perfectly clear that all contracts for wager policies and wagers which were not contrary to the policy of the law were legal contracts; and so it is stated by the Court in *Cousins v. Nantes*, 3 Taunt. 513, 515, to have been solemnly determined in *Lucena v. Craufurd*, 3 B. & P. 75, 2 B. & P. N. R. 269, without even a difference of opinion among all the judges. To the like effect was the decision of the court of error in Ireland, before all the judges except three, in *British Insurance Co. v. Magee*, 1 Cooke & Alc. 182, that the insurance was legal at common law. The contract, therefore, in this case to pay a fixed sum of 1000*l.* on the death of the late Duke of Cambridge would have been unquestionably legal at common law, if the plaintiff had had an interest thereon or not; and the sole question is, whether this policy was rendered illegal and void by the provisions of the stat. 14 G. 3, c. 48. This depends upon its true construction. The statute recites that the making insurances on lives and other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gaming, and for the remedy thereof it enacts “that no insurance *shall be made* by anyone on the life or lives of any person or persons, or on any other events whatsoever, wherein the person or persons for whose use and benefit or on whose account such policy shall be made *shall have* no interest, or by way of gaming and wagering; and that every assurance made contrary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever.” As the Anchor Assurance Company had unques-

tionably an interest in the continuance of the life of the Duke of Cambridge, and that to the amount of 1000*l.*, because they had bound themselves to pay a sum of 1000*l.* to Mr. Wright on that event, the policy effected by them with the defendants was certainly legal and valid, and the plaintiff, without the slightest doubt, could have recovered the full amount if there were no other provisions in the Act. The contract is good at common law, and certainly not avoided by the 1st section of the 14 G. 3, c. 48. This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, however small, the policy would not be avoided. The question arises on the 3rd clause ; it is as follows :—“ And be it further enacted, that in all cases where the insured *hath* interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the assured in such life or lives, or other event or events.” Now, what is the meaning of this provision ? On the part of the plaintiff it is said it means only that in all cases in which the party insuring has an interest when he effects the policy, his right to recover and receive is to be limited to that amount ; otherwise, under colour of a small interest, a wagering policy might be made to a large amount, as it might if the 1st clause stood alone. The right to recover, therefore, is limited to the amount of the interest *at the time of effecting* the policy ; upon that value the assured must have the amount of premium calculated ; if he states it truly, no difficulty can occur ; he pays, in the annuity for life, the fair value of the sum payable at death. If he misrepresents by overrating the value of the interest, it is his own fault in paying more in the way of annuity than he ought, and he can recover only the true value of the interest in respect of which he effected the policy, but that value he can recover. Thus the liability of the assurer becomes constant and uniform, to pay an unvarying sum on the death of the *cestui que vie*, in consideration of an unvarying and uniform premium paid by the assured. The bargain is fixed as to amount on both sides. This construction is effected by reading the word ‘ hath ’ as referring to the time of effecting the policy. By the 1st section the assured is prohibited from effecting an insurance on a life, or on an event wherein he ‘ shall have ’ no interest—that

is, at the time of assuring; and then the 3rd section requires that he shall recover only the interest that he 'hath;' if he has an interest when the policy is made, he is not wagering or gaming, and the prohibition of the statute does not apply to his case. Had the 3rd section provided that no more than the amount or value of the interest should be insured, a question might have been raised, whether, if the insurance had been for a larger amount, the whole would not have been void; but the prohibition to recover or receive more than that amount obviates any difficulty on that head. On the other hand, the defendants contend that the meaning of this clause is, that the assured shall recover no more than the value of the interest which he has at the time of the recovery, or receive more than its value at the time of the receipt. The words must be altered materially to limit the sum to be recovered to the value *at the time of the death*, or, if payable at a time after death, when the cause of action accrues. But there is the most serious objection to any of these constructions. It is, that the written contract, which, for the reasons given before, is not a wagering contract, but a valid one, permitted by the statute, and very clear in its language, is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum as the value of a then existing interest in the event of death, in consideration of a fixed annuity, calculated with reference to that sum, but a contract to pay, contrary to its express words, a varying sum, according to the alteration of the value of that interest at the time of the death or the accrual of the cause of action, or the time of the verdict or execution, and yet the price or the premium to be paid is fixed, calculated on the original fixed value, and is unvarying, so that the assured is obliged to pay a certain premium every year, calculated on the value of his interest at the time of the policy, in order to have a right to recover an uncertain sum, namely, that which happens to be the value of the interest at the time of the death or afterwards, or at the time of the verdict. He has not, therefore, a sum certain, which he stipulated for and bought with a certain annuity; but it may be a much less sum, or even none at all. This seems to us so contrary to justice and fair dealing and common honesty, that this construction cannot, we think, be put upon the section. We should, therefore, have no

hesitation, if the question were *res integra*, in putting the much more reasonable construction on the statute that, if there is an interest at the time of the policy it is not a wagering policy, and that the true value of that interest may be recovered, in exact conformity with the words of the contract itself. The only effect of the statute is to make the assured value his interest at its true amount when he makes the contract. But it is said that the case of *Godsall v. Boldero*, 9 East, 72, has concluded the question. Upon considering this case, it is certain that Lord Ellenborough decided it upon the assumption that a life policy was in its nature a contract of indemnity, as policies on marine risks and against fire undoubtedly are; and that the action was, in point of law, founded on the supposed damnification occasioned by the death of the debtor existing at the time of the action brought, and his lordship relied upon the decision of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1198, that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is in its terms a contract for indemnity only. But that is not the nature of what is termed an assurance for life; it really is what it is on the face of it—a contract to pay a certain sum in the event of death; it is valid at common law, and, if it is made by a person having an interest in the duration of the life, is not prohibited by the stat. 14 G. 3, c. 48. But though we are quite satisfied that the case of *Godsall v. Boldero* was founded on a mistaken analogy, and wrong, we should hesitate to overrule it, though sitting in a court of error, if it had been constantly approved and followed, and not questioned, though many opportunities had been offered to question it. It was stated that it had not been disputed in practice, and had been cited by several eminent judges as established law. The judgment itself was not and could not be questioned in a court of error, for one of the issues, *nil debet*, was found for the defendant. Since that case we know practically—and that circumstance is mentioned by some of the judges in the cases hereafter referred to—that the insurance offices, generally speaking, have not availed themselves of the decision, as they found it very injurious to their interests to do so; they have, therefore, generally speaking, paid the amount of their life insurances, so that the number of cases in which it could be questioned is probably very small indeed; and it

may be truly said that, instead of the decision in *Godsall v. Boldero* being uniformly acquiesced in and acted upon, it has been uniformly disregarded. Then as to the cases, there is no case at law except that of *Barber v. Morris*, 1 Moo. & R. 62, in which the case of *Godsall v. Boldero* was incidentally noticed as proving it to be necessary that the interest should continue till the death of the *cestui que vie*. It was proved in that case to be the practice of the particular office in which that assurance was made, to pay the sums assured without inquiry as to the existence of an insurable interest; and on that account it was held that the policy, though in that case the interest had ceased, was a valuable policy, and the plaintiff could not recover on the ground that the defendant, the vendor of it, was guilty of fraudulent concealment in not disclosing that the interest had ceased. This was the point of the case; and though there was a dictum of Lord Tenterden that the payment of the sum insured could not be enforced, it was not at all necessary to the decision of the case. The other cases cited on the argument in this case were cases in equity, where the propriety of the decision of *Godsall v. Boldero* did not come in question. The questions arose as to the right of the creditor and debtor *inter se*, where the offices have paid the value of a policy, in *Humphrey v. Arabin*, 2 Lloyd & Goold, 318; *Henson v. Blackwell*, 4 Hare, 434, *cor.* Sir J. Wigram, V.-C.; *Phillips v. Eastwood*, 1 Lloyd & Goold (Cas. temp. Sugd.), 281—where the point decided was, that a life policy, as a security for a debt, passed under a will bequeathing debts, the Lord Chancellor stating that the offices found it not for their benefit to act on the rigid rule of *Godsall v. Boldero*. In these cases the different judges concerned in them do not dispute, some indeed appear to approve of, the case of *Godsall v. Boldero*; but it was not material in any to controvert it, and the questions to be decided were quite independent of the authority of that case. We do not think we ought to feel ourselves bound, sitting in a court of error, by the authority of this case which itself could not be questioned by writ of error, and as so few, if any, subsequent cases have arisen in which the soundness of the principle there relied upon could be made the subject of judicial inquiry; and as in practice it may be said that it has been constantly disregarded. Judgment reversed, and a *venire de novo*.”—*Judgment accordingly*.

THE point decided in *Godsall v. Boldero* was distinctly overruled in *Dalby v. India and London Life Assurance Co.*, (see also *Law v. Indisputable Life Policy Co.*, 24 L. J. Ch. 196,) and the continuance of any portion of the interest required by the statute when the policy is effected is no longer necessary. As, however, the greater part of the following note is unaffected by this decision, it is preserved with such alterations as the present state of the law renders necessary.

INSURANCE, whether of ships, or against fire, is a contract of *indemnity*, and whenever an attempt is made to make it answer any other purpose, such an attempt tends to divert it from its original and legitimate object, which renders it the more extraordinary that contracts so plainly wresting it from its proper sphere as *interest or no interest* policies should ever have been recognised by law.

Insurance a contract of indemnity.

That, however, they were so, is certain; though they were so far discouraged as inconsistent with sound principle, that, unless a policy was expressly stated to be made *interest or no interest*, it was understood that the insured was interested, and he was, in case of loss, bound to prove it; see *Lucena v. Craufurd*, 3 B. & P. 75, 101; *Sadlers' Co. v. Badcock*, 2 Atk. 554.

Interest or no interest policies valid at common law.

However, *wager policies*, as they are called, are now forbidden to be made upon British ships, or on goods or effects laden or to be laden on board (see *Smith v. Reynolds*, 1 H. & N. 221; *De Mattos v. North*, L. R. 3 Ex. 185; *Berridge v. Man On Ins. Co.*, 18 Q. B. D. 346,) by 19 G. 2, c. 37, and upon other matters by 14 G. 3, c. 48, which enacts, "that no insurance shall be made by any person or persons, bodies politic or corporate, *on the life or lives of any other person or persons, or on any other event or events whatsoever*, wherein the person or persons for whose use, benefit, or on whose account such policies shall be made, shall have no interest, or by way of gaming or wagering; and every insurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

Forbidden by statutes
19 G. 2, c. 37,
14 G. 3, c. 48.

14 G. 3, c. 48,
s. 1.

By s. 2, the name of the person interested therein, or for whose use, benefit, or account the policy is made, is to be inserted in it. The name must be inserted as that of the person interested; and the Act makes no distinction in this respect between ordinary policies on lives and gaming or wagering policies; *Hodson v. Observer Ass. Co.*, 8 E. & B. 40.

S. 2.

S. 3. By s. 3, in all cases where the insured had an interest in the life or lives, event or events, no greater sum shall be recovered or *received* from the insurer than the value of that interest at the date of the policy; see *Hebdon v. West*, 3 B. & S. 579, *post*, p. 281.

S. 4. By s. 4, marine insurances are exempted from the operation of this Act; and as the 19 G. 2, c. 37, which governs them, does not require the insertion in a marine policy of the name of the person really interested, that is not necessary under that Act. The 28 Geo. 3, c. 56, however, enacts that no policy shall be made on any ship or upon any goods, without inserting the name of one or more of the persons interested, or instead thereof of the consignor, consignee, or of the person who received or gave the order to effect the insurance.

Act does not prevent parties insuring their own lives. The 14 Geo. 3, c. 48, does not extend to prevent individuals from effecting insurances *upon their own lives*, provided that be done *bonâ fide*. But it seems that a man would not be permitted to evade the Act by procuring one in whose life he had no legal interest to insure it with his money and for his benefit, though ostensibly for the advantage of the party insuring; *Wainewright v. Bland*, 1 M. & Rob. 481, 1 M. & W. 32; see also *post*, p. 281. Still, where a life policy is *assigned*, it is not necessary that the assignee should have any interest, or even that he should have paid any consideration; for he stands upon the rights of the party who effected the insurance, and the Act only applies to the original parties to the policy, not to their assignees; *Ashley v. Ashley*, 3 Sim. 149.

To what 14 G. 3, c. 48, extends. The Act does not apply, as has been seen, merely to life policies, but to policies "*on any other event or events whatsoever*." And so sweeping are these words, that it is perhaps not very easy to say precisely what description of wager, if reduced to writing, might not be invalidated by them.

Roebuck v. Hammerton.

In *Roebuck v. Hammerton*, 2 Cowp. 737, (which was the first case decided on this Act), the defendant, in consideration of a certain sum, undertook to pay the plaintiff a greater sum, in case *Monsieur le Chevalier D'Eon* should at any time prove to be a female. At the trial the point was reserved, whether this wager was prohibited by the Act, and the court held that it was so. It must be observed that in this case the wager was drawn up in the form of a policy, and was indorsed as one, and opened to any number of persons who pleased to subscribe.

In *Paterson v. Powell*, 9 Bing. 320, the declaration was upon an instrument, whereby, “in consideration of forty guineas for 100*l.*, and according to that rate for every greater or less sum received,” the subscribers severally promised to any person effecting the insurance the sums subscribed by them respectively, in case certain mining shares should “be done at or above 100*l.* per share on or before” a named date. *Paterson v. Powell.*

The court held this instrument void, as a policy prohibited by the Act. Tindal, C.J., remarked that it had been contended that the words of the Act were confined to cases where there was *a subject matter of insurance exposed to peril*; but that that argument was inconsistent with the words *any event or events whatsoever*: and he cited, on that subject, *Mollison v. Staples*, (Park on Ins., 8th ed., 909), where a policy on the event of there being an open trade between Great Britain and Maryland on or before July 6, 1778, was held void by Lord Mansfield. “Our decision,” he continued, “therefore, must turn upon the provisions of the 14 G. 3, *if this instrument can be deemed a policy*. Upon that point we entertain no doubt. Here is a premium paid, in consideration of the insurers incurring the risk of paying a larger sum upon a given contingency. The instrument is open to all who may choose to subscribe, that is, without restriction of persons or numbers. It then proceeds, in the usual language of policies of insurance—‘We respectively will pay, or cause to be paid, to —, the sum and sums of money which we have hereunto respectively subscribed, without any abatement whatever, in case,’ &c. If the instrument in *Roebuck v. Hammerton* was rightly held to be a policy, I can make no just discrimination between that instrument and the present. It is true that the policy contains no clause about average, because the circumstances of the risk do not require it. But, if the instrument can be deemed a policy without that clause, we should impair the efficacy of the Act of Parliament if we were to consider it as an ordinary contract. I cannot consider it as other than a policy, and, if so, the plaintiff’s claim must receive the same answer as was given by Lord Mansfield in *Roebuck v. Hammerton*; first, that this is an insurance on an event in which the party had no interest: or, if he had, the policy does not disclose the name of any party interested.”

On the other hand, it is too late to contend that there might not be many legal wagers, although, as will be seen Many wagers legal at

common law,
and unaffected
by the
14 G. 3.

*Good v.
Elliott.*

hereafter, the Gaming Act, 1845, renders them, with certain exceptions, incapable of being enforced. And there are instances in which the courts have refused to apply to wagers the provisions of the 14 Geo. 3. Thus, in *Good v. Elliott*, 3 T. R. 693, the action was upon a wager between the parties, whether Tye had bought a certain waggon from Coleman. The declaration stated the nature of the transaction; and, after verdict for the plaintiff, a rule *nisi* was obtained to arrest judgment, but was discharged by the court (*diss.* Buller, J.), after an elaborate discussion of the entire subject. The majority of the judges relied upon several decided cases, as proving that all wagers were not necessarily void at common law, but only those which, by injuring a third person, disturb the peace of society, or which militate against the morality or sound policy of the kingdom; and they remarked that, had the law been otherwise, there would have been no occasion for passing the 14 G. 3 at all. They then proceeded to consider the question, whether the transaction was invalidated by that Act, and concluded that it was not.

"The statute," said Grose, J., "evidently meant that every insurance on lives, or on any *event*, in which the assured has not an interest, shall be void, *whether such insurance be effected in the form of a policy, or by way of gaming or wagering*. And if the construction contended for by the defendant be the true one, it leads to this extraordinary proposition, *viz.*, that a statute which concerns every part of the community, and was passed in 1774, has never been understood by anyone till 1790. To say that every wager is prohibited by this statute, is to say that every wager is an *insurance*; and that the parliament intended to describe a wager by calling it an insurance; which I am of opinion was not their intent." Lord Kenyon, in his judgment, further remarked, that it was apparent that the legislature had *written instruments* only in contemplation, by requiring the names of the parties interested to be inserted therein. And so Hawkins, J., held in *Carlill v. Carbolic Smoke Ball Co.*, (1892) 2 Q. B. 484, 493.

Question
whether distinction
lies in
nature of risk
or in form of
contract
considered.

It will be observed that the majority of the judges in *Good v. Elliott* seem to have considered the distinction between cases within, and cases not within, the meaning of the Act, to consist rather in the *nature of the risk* than in the form (provided it be written) of the contract. Indeed, the construction put upon the Act by Grose, J., is irreconcilable

with any other view; for he said (as is above cited), "The statute meant that every *insurance* on lives, or on any event, in which the assured had not an interest, should be void, whether such insurance be effected in the form of a policy, or by way of gaming or wagering;" manifestly intending to express his opinion that there were two ways of effecting an insurance, the one *in the form of a policy*, the other *by way of gaming or wagering*—that is, *in the form of a bet*; but that, whichever way was adopted, the insurance would equally be void, if the insured had no interest in the subject-matter of insurance. And certainly that construction of the Act appears rational; and there may be something not quite in accordance with common sense in saying that an Act prohibiting a contract can be evaded by shaping the contract in one form rather than another.

Now, if that construction of the statute be the true one, and if insurances be void, though in the form of *wagers*, not of *policies*, the next question will be, *What wagers are, in nature and in substance, insurances, as contradistinguished from mere bets?* and this question, too, seems to be answered by Grose, J., who, using the very words of the Act, says that it evidently intended insurances upon *events*. Now, an *event*, that which will *eventually* happen (*evenire*), seems to include the uncertain—uncertain, because future—issue of any transaction whatever. To give the word *event*, used in the Act, that sense, and to construe every wager *on an event* to be a *policy*, would have the effect of dividing all *written wagers* into two classes:—1. Wagers upon questions capable of solution *in præsenti*.—2. Wagers upon questions incapable of solution *in præsenti*, or *events*. For instance, under the former class would fall a wager whether a particular horse is black or white, since the colour of the horse is an existing fact; under the second class, a wager, whether the foal a mare now goes with *will* be born black or white, as that is a wager upon an *event*.

Wagers,
whether bets
or insurances.

"Event."

But, if such really were the distinction between cases comprised and those not comprised by the Act, it would be a very thin one indeed; for, after all, if two men lay a bet upon a matter, the truth of which is presently ascertainable, although the thing either *is* or *is not*, as is asserted, and therefore its *status* cannot, with reference to the general nature of things, be an *event*, still, as the bettors are themselves uncertain how the truth will upon examination be discovered to be, *their discovery* of the true state of things is

an event, although the thing discovered itself is not. And the distinction would indeed be a fine one, which should consist in the difference between a wager on a future thing, and a wager on the future discovery of an existing thing.

Semble, application of Act determined by form of contract.

But, without adopting this distinction, it is impossible to escape from the conclusion that the application of the Act is to those written contracts only which are in the form of policies: or, to go a little further, that if it do apply to any other contracts it at all events applies only to such as are ordinarily, and in the common course of business, made by way of policy, though the parties may, for the purpose of evading the Act, have framed them in the shape of wagers. That the class of cases, comprehended within the latter part of the above proposition, should be within the provisions of the Act, seems but reasonable. For the former part of the proposition there is great authority.

All wagers, if in form of policies, within Act.

And first, there is authority to prove that all wagers, *if conceived in the form of policies*, are within the Act. In *Roebuck v. Hammerton*, *ante*, p. 270, the wager was not upon an *event*, in the strict sense of that word; but on an existing, though unascertained, fact, the sex of the *Chevalier D'Eon*. It is true that, in the other sense above suggested, treating the discovery as the event, it was on an *event*; for the words were "*in case the Chevalier should at any time prove a female.*" But Lord Mansfield, although the distinction between *existing facts* and *future events* was taken at the bar, founded his judgment, not on that distinction, but on the *form* of the contract. "The parties themselves," said his lordship, "have called it a policy. It is indorsed as a policy, opened as a policy, and any number of persons whatever might have subscribed it as such; therefore, it is clearly within the Act."

In *Paterson v. Powell*, cited *ante*, p. 271, the court, as will be seen on reference to the extracts there made from the judgment of Tindal, C.J., relied particularly upon the form of the contract, which was that of a policy.

Every wager is not an insurance within the Act.

On the other hand, it is clear, as has been said, from *Good v. Elliott*, that it is not every *wager* which is an *insurance* within the meaning of the Act. In *Good v. Elliott*, the wager, it is true, was not upon an *event*; but we have seen already how thin the distinction is between a wager on a future circumstance, and a wager on the future discovery of a present but *unknown* one. (In *Pugh v. Jenkins*, 1 Q. B. 631, however, it was held to make the difference between

the legality and illegality under 9 Ann. c. 14, of a bet on the result of a horse-race.)

In *Morgan v. Pebrer*, 3 B. N. C. 457, the impression of the court appeared to be, that a wager on a future event, if not conceived in the shape of a policy, would not necessarily fall within the Act. It was an action of *assumpsit*; and the declaration stated that in consideration that the plaintiffs would, at the defendant's request, purchase certain Spanish securities, the defendant promised to indemnify them against loss in a particular manner, which he neglected to do. *Plea*, that the contract was for the purchase of public securities, to be delivered on a future day, and was in truth a wager on the price of Spanish securities, by which the plaintiffs, as brokers for the defendant, agreed with certain persons that if the price of the securities should be higher on a certain future day, the defendant should receive the difference; if lower, should pay the difference. *Demurrer*, on the argument of which it was decided, in accordance with *Henderson v. Bise*, 3 Stark. 158; *Wells v. Porter*, 2 B. N. C. 722; *Oakley v. Rigby*, Id. 732; *Robson v. Fallows*, 3 Id. 392; and *Elsworth v. Cole*, 2 M. & W. 31; that time-bargains in foreign securities were not void by the Stock-Jobbing Act, 7 Geo. 2, c. 8 (repealed by 23 Vict. c. 28).

But though that was the principal point raised, the defendant also contended that the contract was a gaming policy, void by 14 Geo. 3, and *Paterson v. Powell* was cited. Upon this point Tindal, C.J., said: "As to the statute 14 Geo. 3, c. 38, there is no case which has treated a simple wager as within the enactments against wagering policies on lives; and I do not see how a simple wager, unobjectionable upon other grounds, can be said to fall within this statute, when it does not even assume the form of a policy of insurance." The observations of the rest of the court were equally strong; and it was expressly stated by Vaughan, J., that Lord Kenyon and Grose, J., had both laid it down "that the statute did not apply, *except in the case where the wager assumed the shape of a policy of insurance.*"

It must, however, be observed on *Morgan v. Pebrer* that it does not seem to have been *necessary* in that case to decide the point, whether a wager on a future event, not conceived in the usual shape of a policy, be within the meaning of the Act or not. For it did not sufficiently appear from the record that the parties were not *interested* in the event. On the contrary, it rather appeared that they were so: for,

Morgan v. Pebrer.

Held statute did not apply unless wager in form of insurance.

Not necessary to decision.

though they were not possessed of the Spanish stock, still, if a contract to buy foreign stock at a future day, or else pay the difference between its then and present price, was not illegal as a time-bargain within the Stock-Jobbing Act, then it is clear that the party making such a contract *had* an interest in the eventual price, and, if so, the case could not fall within the 14 Geo. 3.

And no averment that contract was in writing.

There is another ground on which this case may possibly be exempted from the operation of the Act. Lord Kenyon, it will be remembered, seemed to think that the Act only applied to *written contracts*. Now, there was no averment in any part of the record in *Morgan v. Pebrer*, that any part of the contract there was *in writing*. Whether Lord Kenyon's *dictum* on that subject may be hereafter acquiesced in, is another question. Certainly it would be strange if a *gaming policy*, prohibited from being made in writing, could be good if made by *parol*: and the effect of that clause in the Act which directs the insertion of the name of the party interested may perhaps be, not to render a policy good if verbal, which would be bad if written, but to render a writing necessary in every case. It should be observed that under the Stamp Acts it is necessary that policies should be in writing: see 54 & 55 Vict. c. 39, ss. 91 to 100, and the repealed Acts, 35 Geo. 3, c. 63; 30 Vict. c. 23, s. 7; 33 & 34 Vict. c. 97, ss. 117, 118.

Under Stamp Acts policies must be in writing.

Difficulty of holding valid gaming policies worded as wagers.

Notwithstanding the strong expressions used by the court in *Morgan v. Pebrer*, which, according to the well-known rule, must be referred to the case then before them, it is extremely difficult to suppose that if, in any of those transactions on which policies are usual, a gaming policy were worded like a common wager, it would be held to be thus exempted from the operation of the 14 Geo. 3.

To such cases the expressions of Lord Mansfield in *Foster v. Thackery*, cited by Buller, J., in *Good v. Elliott*, 3 T. R. 693, would forcibly apply. "What," said Lord Mansfield, "is a policy? It is derived from a French word which means a *promise*. Is a particular form necessary? Must it begin, 'In the name of God, Amen?' or refer to Lombard Street? A *mercantile policy* we all know, but a *gaming policy* is a mere wager. If the form were essential under the Act, it may be evaded immediately: for it may begin, 'We promise, if war be declared, we will pay,' &c. Apply that to mercantile events: 'We promise to pay, if the ship sails, and does not arrive,' &c." Perhaps few readers have

perused the admirable judgment of Buller, J., in *Good v. Elliott*, without feeling regret that his construction of the Act was not adopted, and all idle wagers whatever held to be invalidated by it. See also *per* Lord Denman, *Fisher v. Waltham*, 4 Q. B. 893.

It must indeed be observed that, even as the law stands, many wagers are illegal and void as contravening public policy: *e.g.*, bets between voters as to the result of an election; *Allen v. Hearn*, 1 T. R. 56; or bets as to the result of a criminal trial; *Evans v. Jones*, 5 M. & W. 77. In *Fisher v. Waltham*, 4 Q. B. 889, a bet by a clerk that he would not pass his examination for admission as an attorney, was held void on the ground that he had the event in his own hands, which it is presumed the court looked upon as a circumstance inconsistent with there being a consideration for the clerk's promise.

Many wagers
void as against
public policy.

The legislature also has interposed to render wagers, with some few exceptions, incapable of being enforced by action, though it has not made them absolutely illegal; for the Gaming Act, 1845, s. 18, enacts that "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

Gaming Act,
1845, 8 & 9
Vict. c. 109,
s. 18.
Wagers
unenforceable
by action.

The Gaming Act, 1892, further provides that "any promise, *express or implied*, to pay any person any sum of money paid by him *under or in respect of* any contract rendered null and void" by the Gaming Act, 1845, "or to pay any sum of money, by way of commission, fee, reward, or otherwise, in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." This Act is not retrospective; *Knight v. Lee*, (1893) 1 Q. B. 41.

Gaming Act,
1892, 55
Vict. c. 9.

The Act of 1845 does not prevent a person who repudiates a gaming contract from recovering his deposit from a stakeholder, provided that he demands its return before the stake-

Recovery from
stakeholder of
deposit to
abide event
of wager.

holder has paid it over to the winner; *Varney v. Hickman*, 5 C. B. 271; *Martin v. Hewson*, 10 Exch. 737; *Hampden v. Walsh*, 1 Q. B. D. 189; *Batson v. Newman*, 1 C. P. D. 573; *Diggle v. Higgs*, 2 Ex. D. 422; *Trimble v. Hill*, 5 App. Cas. 342; and the Gaming Act of 1892 has not altered the law upon this point; *O'Sullivan v. Thomas*, (1895) 1 Q. B. 698. The rule is the same if the deposit is made with the other party; *Strachan v. Universal Stock Exch.*, (1895) 2 Q. B. 697. Premiums paid upon a policy of insurance upon a life, in which the assured had no insurable interest, cannot, however, be recovered back by the assured upon his repudiating the policy; *Howard v. Refuge Soc.*, 54 L. T. 644. See notes to *Merryweather v. Nixan*, ante, vol. i. p. 386.

Money received by agent on gaming contract.

The Act of 1845 does not prevent a principal from recovering from his agent money received by the agent in respect of gaming contracts made by him for his principal; *Bridger v. Savage*, 15 Q. B. D. 363; see *Beeston v. Beeston*, 1 Ex. D. 13; nor, apparently, does the Act of 1892; *De Mattos v. Benjamin*, 63 L. J. Q. B. 248.

Money paid by agent on gaming contract.

Money paid by one person at the request of another, or by an agent for his principal, upon a gaming contract was formerly recoverable from the person for whom it was paid; *Ex p. Pyke*, 8 Ch. D. 754; *Read v. Anderson*, 13 Q. B. D. 779; and, in the case of an agent employed to make a gaming contract, his authority to pay could not be revoked after he had made the contract, if it was an implied term of his employment that such authority should be irrevocable; *Read v. Anderson*, supra; but see *The Vindobala*, 60 L. T. 657. Now, however, an agent who pays money for his principal, or any person who pays money at the request of another, upon a gaming contract, is prevented by the Act of 1892 from recovering such money from the person for whom it was paid; *Tatam v. Reeve*, (1893) 1 Q. B. 44. In this case the court seems to have decided that it is immaterial whether the person paying the money did or did not know that it was being paid in respect of a gaming contract. Before the Act of 1892, money lent for the purpose of paying lost bets could be recovered; *Ex p. Pyke*, supra; and such a case does not seem to be within that Act.

No action for breach of contract to make bets.

No action will lie for damages for breach of a contract by an agent to make bets for his principal; *Cohen v. Kittell*, 22 Q. B. D. 680.

Deposit as security only.

A deposit of documents, made as security for the performance of a gaming contract, is not within s. 18 of the Act of 1845, for the deposit is not made "to abide the event," that

is, to become the absolute property of the winner ; *Strachan v. Universal Stock Exchange*, (1895) 2 Q. B. 329. But a deposit of money is not recoverable after it has been appropriated to meet a loss ; S. C., Id. 697.

The indorsee for value of a promissory note, given to the indorser in respect of wagering transactions, but not within 9 Anne, c. 14, and 5 & 6 Will. 4, c. 41, may recover the amount of the note though he had notice that it was so given ; *Lilley v. Rankin*, 56 L. J. Q. B. 248.

Indorsee for value of note given for gambling debt.

In the case of contracts for dealings in stocks and shares, if the contract is such that either party is entitled to demand delivery of the stocks or shares, or to tender them for acceptance, then it is not a gaming contract ; but, if the contract is only for the payment of " differences," then it is a gaming contract ; see *Thacker v. Hardy*, 4 Q. B. D. 685 ; *Ex p. Rogers*, 15 Ch. D. 207 ; *Forget v. Ostigny*, (1895) A. C. 318 ; *Shaw v. Caledonian R. Co.*, 17 Ct. of Sess. Cas., 4th series, 466 ; *Universal Stock Exchange v. Stevens*, 66 L. T. 612 ; *Fuller v. Perryman*, 11 Times Rep. 350. As to what contracts amount to wagers within the meaning of this Act, see further, *Rourke v. Short*, 5 E. & B. 904 ; *Higginson v. Simpson*, 2 C. P. D. 76.

Dealings in stocks and shares.

A foot-race has been held to be a " lawful game " within the proviso to s. 18 ; *Batty v. Marriott*, 5 C. B. 818. But if the transaction is in substance a wager, the proviso does not protect it ; thus, if two persons deposit a sum of money to abide the event of a walking match between them, or of a race between their horses, or agree that the winner of a race between their horses shall become the owner of both, the contract is by way of wagering, and is null and void ; *Diggle v. Higgs*, 2 Ex. D. 422 ; *Trimble v. Hill*, 5 App. Cas. 342 ; *Coombes v. Dibble*, L. R. 1 Ex. 248.

Contribution to prize for lawful game.

A kind of gaming having sprung up by the opening of places called betting houses, the owners of which received money on the promise to pay so much upon the events of horse-races or the like, the 16 & 17 Vict. c. 119 (now amended by 37 Vict. c. 15) was passed, by which every such house, office, room, or place is declared to be a common gaming house within the 8 & 9 Vict. c. 109, s. 2 ; and by s. 4, persons receiving money in any such house are made liable to a penalty, and the money so paid can be recovered back under s. 5, as paid to the use of the party making the deposit.

Betting Houses Act, 16 & 17 Vict. c. 119.

The Gaming Act, 1845, did not extend to India (where, however, it has since been followed), and therefore by the common law of England (which was in force in India in

1846) an action was maintainable on a wager made there, although the parties had no previous interest in the subject-matter, if the wager was not against public policy, or against the interest or feelings of third parties, and did not lead to any indecent evidence; see *Ramloll Thackoorseydass v. Soojumnul Dhondmull*, 4 Moo. Ind. App. C. 339.

Nature of interest required by 14 G. 3, c. 48.

With respect to the *nature* of the *interest* which the 14 Geo. 3, c. 48, requires, Lord Tenterden, in *Halford v. Kymer*, 10 B. & C. 724, expressed a strong opinion that it must be a *pecuniary one*. A policy effected by a father, in his own name, on the life of his son, was, in that case, held void. "It is enacted," said Bayley, J., "that no greater sum shall be recovered than the *amount of the value* of the interest of the insured in the life or lives. Now, what was the *amount of the value* of the interest of the party insuring in this case? Certainly not one farthing. If a father, wishing to give his son some property to dispose of, make an insurance on his son's life, in his (the son's) name, not for his (the father's) own benefit, but for the benefit of the son, there is no law to prevent his doing so; but that is a transaction quite different from the present." See also *Hebdon v. West*, 3 B. & S. 579; and *Barnes v. London & Edinburgh Ins. Co.*, (1892) 1 Q. B. 864. In *Worthington v. Curtis*, 1 Ch. D. 419, a father had effected a policy for his own benefit on the life of and in the name of his son, and on his son's death had taken out administration, and received the sum insured. In a creditor's suit it was held that, as the office had not chosen to resist the claim, the maxim *potior est conditio possidentis* applied, and the father was entitled to retain the money as against the creditors.

Creditor.

Servant.

Joint obligor.

A creditor (as is well known) has an insurable interest in his debtor's life; *Anderson v. Edie*, Park, Ins., 8th ed., 915; unless, indeed, the debt be an illegal one; *Dwyer v. Edie*, Id. 914. In *Hebdon v. West*, 3 B. & S. 579, it was held that a clerk in a bank had an insurable interest in the life of the managing partner by reason of an engagement by the manager to employ the clerk at a certain salary for seven years, to the extent of so much of the seven years as remained unexpired at the time of the effecting of the policy. The court also held that the clerk had no insurable interest by reason of a promise to him from the manager that he would not, during his life, enforce payment of a debt due from the clerk to the bank. One of two joint obligors of a bond has an insurable interest in the life of the other; *Branford v. Saunders*, 25 W. R. 650. If a person has pro-

mised to bear the expense of maintaining a child for whose maintenance he is not liable in law, and has undertaken that burden, he has an insurable interest in the child's life to the amount of his actual expenditure; *Barnes v. London & Edinburgh Ins. Co.*, (1892) 1 Q. B. 864.

Upon the analogous question, what constitutes an insurable interest in cases of marine insurance, which, as we have seen, are excluded from the operation of this Act, see *Seagrave v. Union Marine Ins. Co.*, L. R. 1 C. P. 305; *Wilson v. Jones*, L. R. 1 Ex. 193, 2 Id. 139; *Ebsworth v. Alliance Marine Ins. Co.*, L. R. 8 C. P. 596; *Inglis v. Stock*, 10 App. Cas. 263.

Interest in
marine
insurances.

A trustee may insure in respect of the interest of which he is trustee; *Tidswell v. Ankerstein*, 1 Peake, 151. Lord Kenyon held, at *nisi prius*, that a wife, who had insured her husband's life, need not prove that she was interested in it, for that must be presumed; *Reed v. Royal Exchange Ins. Co.*, 2 Peake, 70. It has been always considered clear that a man may insure his own life; but, as has been already observed (p. 270), the Court of Exch. expressed an opinion, in *Wainwright v. Bland*, that a man cannot, in order to evade the Act, legally insure his own life with the money, and for the benefit, of another who has no interest. Indeed, there is another objection to such a proceeding, arising from s. 2 of the Act, which requires the insertion of the name of the person on whose account the policy is underwritten; see *Evans v. Bignold*, L. R. 4 Q. B. 622. In *Shilling v. Accidental Death Ins. Co.*, 2 H. & N. 42, an action was brought by the executrix of J. upon a policy of insurance on his life, and a plea was held good, which alleged that the policy had been made by T. in J.'s name, for the

Trustee.

Wife.

Insurance on
man's own life
with money
and for benefit
of another.

Shilling v.
Accidental
Death In-
surance Co.

se, benefit, and account of T., and not of J., and that T. had no interest in J.'s life. *Quære*, if an allegation in a declaration upon a policy that A. and B. were interested is satisfied by proof that A. was mortgagor, and B. mortgagee; see *Pim v. Reid*, 6 M. & Gr. 1.

Mortgagor and
mortgagee.

We have already seen that s. 3 of the 14 Geo. 3, c. 48, provides that in all cases where the assured had an interest in the life or event in respect of which the policy is effected, no greater sum shall be *recovered or received from the insurer or insurers* than the value of that interest at the date of the policy. The Queen's Bench put upon these words, in *Hebdon v. West*, 3 B. & S. 579, the construction, that where there are several policies effected with different offices, the

No greater
sum recover-
able than
value of
interest at
date of policy.

Hebdon v.
West.

Rule the same though there be double insurance.

assured can recover no more from the insurers, whether on one policy or many, than the amount of his insurable interest. "Looking," said the court, "to the declared object of the legislature, we are of opinion that though, upon a life policy, the insurable interest at the time of the making the policy, and not the interest at the time of the death, is to be considered, it was intended by the 3rd section of the Act that the insured should in no case recover or receive from the *insurers* (whether upon one policy or many) more than the insurable interest which the person making the insurance had at the time he insured the life. If for greater security he thinks fit to insure with many persons and by different contracts of insurance, and to pay the premiums upon each policy, he is at liberty to do so, but he can only recover or receive upon the whole the amount of his insurable interest; and if he has received the whole amount from one insurer, he is precluded by the terms of the 3rd section of the statute from recovering or receiving any more from the others. Any argument arising from the supposed hardship of allowing the insurers in such a case to receive and retain the premiums without being obliged to pay the consideration for which such premiums were paid, would be equally applicable to the case of marine insurances, upon which, however many policies there may be, the underwriters are only liable to the extent of the value insured."

Ground of *Godsall v. Boldero* that insurance is a contract of indemnity.

The principal case of *Godsall v. Boldero* did not indeed turn on the 14 Geo. 3, but on the common law doctrine (which was then supposed to extend to insurances on lives), that insurance is a contract of indemnity, the Act applying to cases where there never was an interest to insure. It is now decided that *a contract of life assurance is not one of indemnity*, and that the effect of the Act is only to require an interest in the life at the date of the contract; *Dalby v. India and London Ass. Co.*, ante, p. 262.

Life insurance is not.

Doctrine of *Godsall v. Boldero* not applied in converse case.

Although the doctrine laid down in *Godsall v. Boldero* was recognised in *Ex p. Andrews*, 1 Madd. 573; *Henson v. Blackwell*, 4 Hare, 434; *Barber v. Morris*, 1 M. & Rob. 62; yet it was decided that the converse of *Godsall v. Boldero* did not hold good; so that where an owner of stacks, maliciously set on fire, had been paid the amount of his loss by an insurance office, he was allowed, notwithstanding, to recover against the hundred, under the 9 Geo. 1, c. 22; *Clark v. Blything*, 2 B. & C. 254; *Mason v. Sainsbury*, 2 Marshall

on Insurance, 3rd ed., 796 ; see *Yates v. Whyte*, 4 B. N. C. 272. And it has been held that, in an action for personal injuries sustained through the defendant's negligence, a sum received by the plaintiff upon an accidental insurance policy cannot be taken into account in reduction of damages ; *Bradburn v. G. W. R. Co.*, L. R. 10 Ex. 1 ; see *Jebsen v. E. & W. India Dock Co.*, L. R. 10 C. P. 300.

But where the claim for damages is made under Lord Campbell's Act, as the claim is restricted to the actual *pecuniary loss* sustained by the claimant, the acceleration of the receipt of insurance money may be taken into account in estimating the damages, though the amount received cannot ; *Hicks v. Newport R. Co.*, 4 B. & S. 403 n. ; *Grand Trunk R. Co. v. Jennings*, 13 App. Cas. 800.

In *Holland v. Smith*, 6 Esp. 11, Lord Ellenborough seemed to be of opinion that if A. insured the life of B. his debtor, and afterwards the debt was paid off, B. might, by continuing to pay the premiums, keep the policy alive for his own benefit. "The *primâ facie* effect of an agreement between debtor and creditor, in a transaction such as the present, that the creditor shall effect a policy, and that the debtor shall pay the premiums, is to vest the equitable property in the policy, subject to the creditor's security, in the debtor ; the principle being, that what the debtor pays or agrees to pay for is (*primâ facie* at all events) his, subject to the security for which it was brought into existence ;" *Salt v. Northampton*, (1892) A. C. 1, 16, *per* Lord Herschell.

Debtor's right to policy after payment of debt.

As to the circumstances under which a stranger to the policy who pays premiums to keep it up may acquire a lien for the amount so paid ; see *Re Leslie*, 23 Ch. D. 552 ; *Falcke v. Scottish Co.*, 34 Id. 234 ; *Re Winchelsea*, 39 Id. 168 ; *Strutt v. Tippet*, 62 L. T. 475 ; and *ante*, vol. i., p. 142.

That the 14 Geo. 3 only applied to the original parties to the contract, and not to their assignees, we have already seen in *Ashley v. Ashley*, *ante*, p. 270. The effect therefore of the decision in *Dalby v. India and London Ass. Co.*, seems to be to put the original party effecting the policy in the same position as an assignee confessedly was in, and to make the contract itself what in its terms it purports to be, not one of indemnity, but an engagement to pay a certain sum on the happening of a certain event, in consideration of the payment of the premiums in the meanwhile.

Effect of *Dalby v. India and London Ass. Co.*

Marine insurances and insurances against fire still remain, Marine and

fire insurances
still contracts
of indemnity.

Powles v.
Innes.

Insurable
interest not
determined by
assignment
after loss.

Policies of
Marine Assur-
ance Act,
1868.

Judicature
Act, s. 25,
sub-s. 6.

Subrogation to
benefit of all
rights en-
forced or
enforceable
by assured.

as they purport in terms to be, contracts of indemnity. Thus, in *Powles v. Innes*, 11 M. & W. 10, it was held that a person who assigns away his interest in a ship or goods after effecting a policy of insurance thereon, and before the loss, cannot sue upon the policy: except as trustee for the assignee in cases where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit. On the other hand, the insurable interest of the assured is not determined by his parting after the loss with the property insured; for he may sue in respect of any loss which he has suffered; *Lloyd v. Fleming*, L. R. 7 Q. B. 299, 302; or, where he has assigned the property together with the benefit of the policy, he may sue as trustee for the assignee; *Sparkes v. Marshall*, 2 B. N. C. 761. Where a contract of sale of property insured contained no reference to the insurance, it was held (James, L.J., dissenting) that the vendor, who on the destruction of the property by fire before payment of the purchase-money recovered the amount insured, did not receive it as trustee for the purchaser, and could not be compelled to hand it over to him; *Rayner v. Preston*, 18 Ch. D. 1; see also *Hutchinson v. Wright*, 25 Beav. 444. As to when a trustee may sue and what he may recover, see *Ebsworth v. Alliance Marine Ins. Co.*, L. R. 8 C. P. 596.

By 31 & 32 Vict. c. 86, the assignee of the policy is empowered to sue in his own name where a policy on any ship, goods, or freight has been assigned "so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured." In *Lloyd v. Fleming*, L. R. 7 Q. B. 299, it was held that, under this Act, the assignee of a policy, "duly assigned" after loss, might properly maintain an action in his own name on the policy; see *North of England Co. v. Archangel Co.*, L. R. 10 Q. B. 249, where an assignment after the interest of the assignor had ceased was held to be ineffectual. The Judicature Act, 1873, also contains wide provisions for transferring to the assignees of legal choses in action all legal rights and remedies in respect of the same; see s. 25, sub-s. 6.

Where property insured has been destroyed by fire after a contract of sale, the unpaid vendor, while retaining his right to compel payment of the purchase-money, can nevertheless, before it has been paid, enforce his claim against the insurers; *Collingridge v. Royal Ass. Co.*, 3 Q. B. D. 173;

but the insurers who have paid will be entitled to recover back from him, after payment of the purchase-money, an amount equal to the sum recovered by him under the insurance. For, the contract of fire insurance being one of indemnity, the insurers are not merely subrogated to all rights of action of the assured whereby his loss may be diminished, but are also entitled to the benefit of anything which the assured has received in reduction of the loss, provided it was due to him as of right and was not merely bestowed as a gift; see *Castellain v. Preston*, 11 Q. B. D. 380, distinguishing *Burnand v. Rodocanachi*, 7 App. Cas. 333; see also *Darrell v. Tibbitts*, 5 Q. B. D. 560; *Marine Ins. Co. v. China Transpacific Steamship Co.*, 11 App. Cas. 573. If the purchase-money has not been paid, the insurers, after admitting the claim upon the policy, may sue, in the name of the insured, to enforce his rights against the purchaser; see *Simpson v. Thomson*, 3 App. Cas. 279; *Midland Ins. Co. v. Smith*, 6 Q. B. D. 561; *Commercial Union Ass. Co. v. Lister*, 9 Ch. 483.

Another effect of the rule that insurance, other than life insurance, is a contract of indemnity, is that if there be two insurers of the same subject-matter, and one of them pays the loss, the other is discharged; *Morgan v. Price*, 4 Exch. 615. The rule, however, is, when applicable, subject to a qualification which applies to all cases of valued policies, namely, that the parties may agree upon a merely arbitrary estimate of the value of the subject insured, by way of liquidated damages; and this estimate will, in the absence of fraud, be the measure of the insurer's liability; see *Irving v. Manning*, 6 C. B. 391; *Barker v. Janson*, L. R. 3 C. P. 303.

Payment by one of two insurers.

Qualification in case of valued policies.

The effect of this rule as to the valuation in a policy, combined with the other as to insurances being contracts of indemnity, is that, where an assured has been reimbursed either by payment of another policy or otherwise, the amount received goes in reduction *pro tanto* of his claim, and if it amounts to the valuation in the policy it extinguishes the claim. On this principle was based the decision in *Irving v. Richardson*, 1 M. & Rob. 153. There, the defendant insured for 1700*l.* with a Glasgow company, and 2000*l.* with the Alliance office, on a ship, valued in both policies at 3000*l.*: he received both sums, the Alliance not being, when they paid, aware of the other insurance. The Alliance afterwards brought an action to recover back 700*l.*, being

Irving v. Richardson.

the excess of the amount paid above the value declared, and Lord Tenterden held them entitled to recover, the defendant being bound by the valuation in the policy, though the vessel was really worth 3700*l*.

Bousfield
v. Barnes.

It is true that in *Bousfield v. Barnes*, 4 Camp. 228, where the values declared were 6000*l*. in one policy, and 8000*l*. in another, the insured was permitted to recover 600*l*. upon the former policy, though he had already recovered 6000*l*. on the latter, the real value being 8500*l*. It is, however, submitted that *Bousfield v. Barnes*, which was doubted in *Irving v. Richardson*, must be considered as overruled by *Bruce v. Jones*, 1 H. & C. 769. In that case the action was brought on a policy for 2400*l*. upon a ship valued at 3200*l*. The ship was insured by other policies, in one of which the value was fixed at 5000*l*. On these other policies the plaintiff had received 3126*l*., and he was held entitled to recover only the difference between that sum and 3200*l*., the value in the policy sued upon. In *North of England Co. v. Armstrong*, L. R. 5 Q. B. 244, a ship, insured in a valued policy for 6000*l*., was run down and sunk by another ship, and the insurers thereupon paid to the owners 6000*l*. The owners afterwards recovered 5000*l*. for the damage caused by the collision, and it was held, that although the true value of the ship was 9000*l*., the insurers were nevertheless entitled to the damages thus recovered, which were in the nature of salvage.

Bruce v.
Jones, pay-
ment upon
one of two
valued policies
a defence *pro*
tanto on the
other.

North of
England
Insurance
Ass. v.
Armstrong.

Policy on
goods lost or
not lost covers
past losses.

A policy on goods "lost or not lost" is "a contract of indemnity against all *past* as well as all *future* losses sustained by the assured in respect to the interest insured;" where therefore a policy was effected on goods for a voyage, *lost or not lost*, it was held that the assured might recover for damage to the goods from perils of the sea during the voyage, although such damage had been sustained before the purchase of the goods by the assured, it not appearing that the goods had been purchased *as damaged goods*; *Sutherland v. Pratt*, 11 M. & W. 296.

19 G. 2, c. 37,
does not apply
to foreign
ships.

It must be observed that the 19 Geo. 2, c. 37, does not apply to foreign ships. They were omitted from its provisions, it is said, owing to the difficulty of bringing witnesses from abroad to prove interest. Insurances on foreign ships therefore continued valid, even though there was no interest, provided the policy appeared on the face of it to be a wager policy; see *Thellusson v. Fletcher*, 1 Dougl. 315; *Craufurd v. Hunter*, 8 T. R. 13; *Lucena v.*

Craufurd, 3 B. & P. 75, 101; and *Cousins v. Nantes*, 3 Taunt. 513. They are, however, probably now void under 8 & 9 Vict. c. 109, *ante*, p. 277.

The 14 Geo. 3 has been held not to affect a contract by which an expected devise from a third person is assigned in consideration of a loan to be repaid only if the devise does not take place; *Cook v. Field*, 15 Q. B. 460; or an offer by advertisement to pay 100*l.* to the buyer of a smoke-ball if its use does not protect him from influenza; *Carlill v. Carbolic Smoke-Ball Co.*, (1892) 2 Q. B. 484, (1893) 1 Q. B. 256.

ROSE v. HART.

TRINITY, 58 G. 3.—C. P.

[REPORTED 8 TAUNT. 499 (20 R. R. 533).]

Trover for cloths deposited by the bankrupt, previously to his bankruptcy, with the defendant, a fuller, for the purpose of being dressed: Held, that the defendant was not entitled to detain them for his general balance for such work done by him for the bankrupt previously to his bankruptcy; for that there was no mutual credit within stat. 5 G. 2, c. 30, s. 28.

TROVER for cloths deposited by the bankrupt, previously to his bankruptcy, with the defendant, who was a fuller, for the purpose of being dressed. At the trial, before Holroyd, J., at the Salisbury Spring Assizes, 1817, it appeared that when the cloths were so deposited there was a debt due from the bankrupt to the defendant for other cloths dressed by the latter. After the bankruptcy the plaintiffs tendered the sum due for dressing the cloths in question to the defendant, who refused to deliver them up, without payment of the whole debt due to him from the bankrupt. They then brought their action. For the defendant it was contended that the case came within the principle laid down in *Olive v. Smith* (a), and that he was entitled to retain the cloths for his general balance. The jury found a verdict for the plaintiffs; and Holroyd, J., having reserved the point,

Pell, Serjt., in Easter Term, 1817, moved for a rule *nisi* to set aside the verdict and enter a nonsuit, on the ground urged at the trial, and he cited *Ex parte Deeze* (b), as in point, and observed, that the principle of the cases which contradicted the doctrine there laid down was vicious, inasmuch as it went to destroy the law of lien.

GIBBS, C.J.—You are aware of the case of *Green v. Farmer* (c), which, by-the-by, I may say has been frequently disregarded. In a case in which I have the brief, and in which case Lord

(a) 5 Taunt. 56.

(b) 1 Atk. 228

(c) 4 Burr. 2214.

Ashburton was, a special custom for dyers to have their general lien was proved; and, notwithstanding *Green v. Farmer*, that custom was acted upon in that case, and has been many times since recognised. The case *Ex parte Deeze* is certainly contradictory to the case *Ex parte Ockenden* (d), subsequently decided. The question is of the utmost importance, and we are quite open to hear it discussed. Take your rule.

Rule *nisi* granted.

In the following Trinity Term cause was shown by

Lens, Serjt., who contended that Lord Hardwicke, in *Ex parte Ockenden*, recognised by Mansfield, C.J., in *Green v. Farmer*, had much narrowed the extensive construction which he had put, in *Ex parte Deeze*, on the words "mutual credits" in the stat. 5 G. 2, c. 30, s. 28, and had excluded cases like the present from its operation; and referred to the case of *Chase v. Westmore* (e), where a point similar to the present was made, but the court, thinking that that case did not involve the question of mutual credits, gave judgment on the point of lien. He also cited *Birdwood v. Raphael* (f), and contended that the decision in *Olive v. Smith* (i) did not apply to the present case.

Pell was then heard in support of the rule. If the defendant had sold these cloths, and the assignees had brought their action for money had and received, they must clearly have allowed to the defendant the amount of their general balance against the bankrupt, before they could have recovered the difference, if any, from the defendant. Mutual credit is used as synonymous with mutual trust. "Where there is a trust between two men, on each side, that makes a mutual credit" (g). The case *Ex parte Deeze*, and the whole reasoning of Lord Hardwicke on the subject of mutual credit in that case (which is recognised and confirmed in *French v. Fenn*, in *Smith v. Hodson* (h), and both by Gibbs, J., in his statement of his opinion at the trial in *Olive v. Smith* (i), and subsequently by the whole court in their final decision), is most strong for the defendant; but if the case *Ex parte Ockenden*, in which no judgment was given, is to be upheld against the case

(d) 1 Atk. 235.

(e) 5 M. & S. 180.

(f) 5 Price, 593.

(g) *Per Buller, J., French v. Fenn*,

Cooke, B. L. 8th ed., 568.

(h) 4 T. R. 211.

(i) 5 Taunt. 56.

Ex parte Deeze, confirmed over and over again by subsequent decisions, then it is admitted that the defendant cannot succeed.

It is true that this is an action of trover, and no case of this precise nature has been decided; but the plaintiffs, by their choice of action, can never prevent the defendant from having the benefit of this statutable lien. In *Jennings v. Rundall* (k), the plaintiff shaped his case in tort, in order to deprive the defendant of the benefit of his infancy; but the defendant pleaded his infancy, and it was holden a good plea. In *Ex parte Deeze*, Lord Hardwicke says, "It is very hard to say that mutual credit should be confined to pecuniary demands, and that if a man has goods in his hands belonging to a debtor of his, which cannot be got from him without an action at law or bill in equity, it should not be considered a mutual credit." "There have been many cases which the clause of the Act has been extended to, when an action of account would not lie, nor could this court, upon a bill, decree an account." These strong expressions acquire double strength when the judgment of Mansfield, C.J., in *Olive v. Smith*, is referred to. "I should have thought that the words of the statute meant only money transactions; but if the extension of mutual credit be, as it has been contended, a mistaken doctrine, the mistake is so deeply rooted that it would be rash to overturn it; and there is a great deal of justice in the determination at which, not only the Court of King's Bench, but the Court of Chancery, have arrived on this point." This is hardly saying less than that the statute extends to cases of trover, and the whole judgment lays down the rule of extension on the broadest ground; a rule resting as much on sound law as it does on justice. [BURROUGH, J.: Is it the true meaning of the Act, to extend the doctrine of mutual credit to cases where the goods are not ultimately to be turned into money?—DALLAS, J.: Where the goods are specifically to remain as goods?] Lord Hardwicke, in *Ex parte Deeze*, expressly goes on that ground. [BURROUGH, J.: In *Lanesborough v. Jones* (l), which was a decision on stat. 4 Anne, c. 17, s. 11, the judgment of Lord Chancellor Cowper went on the ground that there was a plain mutual credit.] In *French v. Fenn*, if trover had been brought, it must have been

(k) 8 T. R. 335.

(l) 1 P. Wms. 325.

brought on the same ground on which it may be brought here. [BURROUGH, J.: No. In *French v. Fenn*, the pearls were sent out on an express contract to be sold, and, though the sale was after the bankruptcy, the contract was before the bankruptcy.] In *Smith v. Hodson*, the assignees might have brought trover; and the whole judgment in that case goes to show that, if the action had been so shaped, the assignees might have recovered. [GIBBS, C.J.: The judgment of the court, in *Smith v. Hodson*, as to the probable success of the assignees, if they had brought trover, goes on the ground of fraud and undue preference, with which that case was tainted.] The language of the courts, in *Ex parte Deeze*, *French v. Fenn*, and *Olive v. Smith*, is clear to show that the form of action can make no difference; and the plaintiffs (*m*) are not to be shut out from the benefit of the rule so broadly laid down and so strongly confirmed, because this is the first action of trover for goods in specie on which the point has arisen.

Cur. adv. vult.

And now, the case having stood over till this day, GIBBS, C.J., delivered the judgment of the court.

This was an action of trover for cloths left by Smart, before his bankruptcy, with the defendant, who was a fuller, to be dressed. There was then a balance due from the bankrupt to the defendant for work done on other cloths. The assignees tendered to the defendant the sum due for work done on the cloths in his possession, and demanded them from him; but the defendant refused to deliver them up, unless he was paid his general balance.

The question was, Whether he were entitled to retain them for that balance? And Mr. Justice Holroyd, before whom the cause was tried, at the Spring Assizes for Salisbury, 1817, reserved the point for the opinion of the court; and we are of opinion that the defendant, who received these cloths for the purpose of dressing only, had no right to detain them for his general balance.

He founds his claim on the ground of mutual credits, mentioned in stat. 5 Geo. 2, c. 30, s. 28, and the construction which has been put upon that statute.

(*m*) *Sic* in the report, but it ought to be *defendant*.

The case *Ex parte Deeze* (n) is not distinguishable from the present. There, a packer claimed to retain goods, not only for the price of packing them, but for a sum of 500*l.* lent to the bankrupt on his note ; and Lord Hardwicke determined that he had such right, on the ground of mutual credits, to which he gives a very extensive effect, and says that the clause relative to them has always received a very liberal construction.

This doctrine, if it were supportable, would apply directly to the present case, and would establish the defendant's right to retain for his general balance.

But, in the case *Ex parte Ockenden*, which came before Lord Hardwicke about six years after the former, he very much narrows the extensive construction that he had before put on the words " mutual credits " in the statute 5 G. 2, c. 30, s. 28, and determines in express terms that a case like the present does not fall within them.

That the cases *Ex parte Deeze* and *Ex parte Ockenden* are accurately reported by Atkyns, we have the authority of Lord Mansfield, in *Green v. Farmer* (o), who confirms them by his own notes.

It appears, therefore, that the final opinion of Lord Hardwicke, after a very full consideration of the subject, would exclude the present case from the protection of the statute as a mutual credit, though he admits that the words " mutual credits " have a larger effect than mutual debts, and that under them many cross claims may be allowed in cases of bankruptcy, which in common cases would be rejected.

I am not aware of any later decision upon this subject, until the case of *French and another, Assignees of Cox v. Fenn*, which occurred in the year 1783, and is very fully and correctly reported in Cooke's Bankrupt Laws (p).

Cox, the bankrupt, was indebted to Fenn, and had entrusted him with his share or interest in a string of pearls, to be sold by Fenn, and the profit on such share to be paid to Cox. Fenn sold the pearls after Cox's bankruptcy, and Cox's assignees brought an action against Fenn for his share of the profit. On the part of the defendant it was insisted that there was a mutual credit,

(n) 1 Atk. 228.

(o) 4 Burr. 2222.

(p) 565, 8th ed.

though not a mutual debt, at the time of the bankruptcy, and that one could not be demanded without satisfying the other.

The doctrine of Lord Hardwicke in *Ex parte Deeze* was relied on by the counsel, and seemed to be fully adopted by the court, without adverting to the qualification which it received from the case *Ex parte Ockenden*; and, applying that doctrine to the case before them, they determined that Fenn was protected from the claim of Cox's assignees by the clause of mutual credits.

French v. Fenn has been followed by a string of causes, running through a period of more than thirty years, all professing to depend upon it, some of them containing the fullest approbation of *Ex parte Deeze* from the Bench.

Whatever I might think of the original decision, I could not persuade myself to break in upon a class of cases so long established; and if they could not be supported without carrying the doctrine found in *Ex parte Deeze* to its fullest extent, speaking for myself, I should be ready to follow it, rather than overturn all that has been settled upon this subject for such a length of time.

But it is first to be considered whether these cases may not be supported by a construction of the statute which will not go to that extent, and will leave the opinion of Lord Hardwicke in the case of *Ex parte Ockenden* untouched.

By the 28th section of 5 G. 2, c. 30, it is enacted "that where it shall appear to the said commissioners, or the major part of them, that there hath been *mutual credit*, given by the bankrupt and any other person, or *mutual debts* between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and *one debt* may be set against another; and what shall appear to be due on either side, on the balance of such account, and on setting such *debts* against one another, and no more, shall be claimed or paid on either side respectively."

Something more is certainly meant here by *mutual credits* than the words *mutual debts* import; and yet, upon the final settlement, it is enacted merely that *one debt* shall be set against another. We think this shows that *the legislature meant such credits only as must in their nature terminate in debts*; as where a debt

is due from one party, and credit given by him on the other hand for a sum of money payable at a future day, and which will then become a debt; or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other: in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with; but where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute.

This principle will support all the cases from *French v. Fenn* to *Olive v. Smith*, which is the last that has occurred.

In *French v. Fenn* there was a debt due from Cox to Fenn, and Cox entrusted Fenn with his share in the pearls *for sale*, which when sold would constitute a *cross debt* for the produce from Fenn to Cox.

In *Smith v. Hodson* (q), the defendant had entrusted the bankrupts with his acceptance, which he was liable to pay, and which when paid would create a debt from the bankrupts to him for the amount.

In *Parker v. Carter*, Cooke, Bankrupt Laws, 548, and *Olive v. Smith*, the bankrupts were indebted to the defendants, and the bankrupts delivered policies of insurance to the defendants to collect losses under them, which, when collected, would make the defendants *their debtors* for the amount.

So, in all the other cases which have occurred upon this subject, it will be found that that which has been allowed as a mutual credit has always been of such a nature as must terminate in a *cross debt*.

To this extent we think the statute may be carried, but no further; and we follow the final opinion of Lord Hardwicke, in determining that the delivery of these cloths to the defendant, for the purpose of being dressed, does not form an article of mutual credit in his favour within the fair construction of the clause relied on.

The *postea* must therefore be delivered to the plaintiffs (r).

(q) 4 T. R. 211.

(r) Dallas, J., was absent from illness, but concurred in this judgment, *ex relatione* Gibbs, C.J. See *Sampson v.*

Burton, 2 B. & B. 89, particularly the judgment of Burrough, J.; and, in p. 96 of that report, for "1818" read "1817."

THIS is the leading case on the subject of *mutual credit*. The prior decisions were, as will have been seen in the text, at variance with one another; and the rule established in *Rose v. Hart* has ever since been recognised and acted upon. It was determined after much consideration, for Burrough, J., states in *Sampson v. Burton*, 2 B. & B. 89, that the judges had several meetings upon it.

The right of set-off in *bankruptcy* is shown by Mr. Christian (1 Chr. 499) to have existed from a very early period, certainly before 4 & 5 Anne, c. 17, in which it first received the express sanction of the legislature; see *Anon.*, 1 Mod. 215; *Chapman v. Derby*, 2 Vern. 117. The policy of allowing a set-off between moneys due to and from a bankrupt's estate is precisely the same as that in which the law relative to *stoppage in transitu* originated. It is to prevent one man's debts being paid with another man's money, which would take place if a man, being at once the debtor and creditor of a bankrupt, were forced to *pay* the whole of his debt, and *receive* only a dividend. The right of set-off in bankruptcy is, therefore, distinct, in origin and principle, from the right of set-off in actions, which was given by the statutes of set-off, 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 4, to prevent cross actions; see *per* Parke, B., *Forster v. Wilson*, 12 M. & W. 191. The provisions of the Judicature Acts, 1873 and 1875, and of R. S. C., Order XIX. r. 3, have had the effect of extending the right to set up cross-claims in actions.

Origin of set-off in bankruptcy.

Distinct from set-off in actions.

The enactment in 4 & 5 Anne was followed by a similar one in 5 Geo. 1, c. 24, s. 11; then with improvements by 5 Geo. 2, c. 30, s. 28 (cited, *ante*, p. 293), under which *Rose v. Hart* was decided. None of these Acts, however, went further than to allow a set-off upon the accounts existing at the time of the bankruptcy; see *Dickson v. Evans*, 6 T. R. 57. The 46 Geo. 3, c. 135, s. 3, extended the right of set-off to cases where the credit was given within two months of the date of the commission, provided the person giving it had not notice of a prior act of bankruptcy, or that the bankrupt was insolvent or had stopped payment. It was found, however, that, even with this extension, cases of hardship occurred; see *Kinder v. Butterworth*, 6 B. & C. 42; and therefore, in 1825, the 6 Geo. 4, c. 16, s. 50, made notice of an act of bankruptcy the sole dividing point at which the right of set-off terminates; see *Hawkins v. Whitten*, 10 B. & C. 217; *Dickson v. Cass*, 1 B. & Ad. 343. This section was re-enacted (with the substitution of the word "court" for the word "com-

Successive statutes recognising and extending it.

missioners") in the Act of 1849, 12 & 13 Vict. c. 106, s. 171, which provided:—

Bankruptcy
Act, 1849,
12 & 13 Vict.
c. 106, s. 171.

"That where there *has been mutual credit* given by the bankrupt and any other person, or where there *are mutual debts* between the bankrupt and any other person, the court shall state the account between them, and one debt or demand may be set against another, *notwithstanding any prior act of bankruptcy committed by such bankrupt* before the credit given to, or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made proveable against the estate of the bankrupt, may also be set-off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, *when such credit was given, notice of an act of bankruptcy* by such bankrupt committed."

This section was, in its turn, replaced by s. 39 of the Bankruptcy Act, 1869; and that, again, by s. 38 of the Bankruptcy Act, 1883, the enactment now in force. Its words are practically the same as those of the Act of 1869, and are as follows:—

Bankruptcy
Act, 1883,
46 & 47 Vict.
c. 52, s. 38.

"Where there have been mutual credits, mutual debts, *or other mutual dealings* between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case *where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy* committed by the debtor, and *available against him*."

With the addition of the words "other mutual dealings," which first appeared in the Act of 1869, and the effect of which will be considered hereafter, this section, like its predecessor, is substantially a re-enactment of the previous Acts, as interpreted by judicial decisions, and the cases, therefore, upon the question of *mutual credit* under these Acts continue for the most part to be authorities. Though the words of the earlier Acts, "notwithstanding any prior

act of bankruptcy," are now omitted, an implication equivalent to them arises from the rest of the section; see *Elliott v. Turquand*, 7 App. Cas. 79, 86.

Notice of an act of bankruptcy, available against the debtor, is now, therefore, the dividing point at which the right of set-off terminates. That is to say, the mutual credit must, as a general rule, exist at the time of the commencement of the bankruptcy (see s. 43 of the Act of 1883), but, if the commencement of the bankruptcy relates back to an act of bankruptcy, the person claiming the benefit of s. 38 in respect of transactions taking place after the commencement of the bankruptcy, but before the receiving order, is not deprived of his right of set-off unless he had notice of an available act of bankruptcy; *Dickson v. Evans*, 6 T. R. 57; *Forster v. Wilson*, 12 M. & W. 191, 195; *Boyd v. Mangles*, 16 Id. 337; *Bailey v. Johnson*, L. R. 6 Ex. 284, *per Martin, B.*; *Elliott v. Turquand*, 7 App. Cas. 79.

When right
of set-off
terminates.

Therefore, it was held, under the Act of 1825, that a person who, after bankers had actually stopped payment, collected their notes for the express purpose of setting them off against a debt due from himself to the firm, should be allowed to do so, as he had no notice of any act of bankruptcy actually committed; *Dickson v. Cass*, 1 B. & Ad. 343; *accord. Hawkins v. Whitten*, 10 B. & C. 217. But it was held in the same case that he could not set off notes which he had taken after he knew that some of the partners had committed acts of bankruptcy. In *Re Gillespie*, 14 Q. B. D. 963, it was held, under the present Act, that a creditor of the bankrupt cannot set off his claims on the bankrupt's estate against his liability thereto on a bill accepted by him with notice of an act of bankruptcy. See also *Re Milan Tramways*, 25 Ch. D. 587. As to what amounts to notice of an act of bankruptcy, see *Ex p. Snowball*, 7 Ch. 534. The onus lies on the person claiming the benefit of s. 38 to show that he had no notice of an available act of bankruptcy; see *Ex p. Rivell* (No. 2), 13 Q. B. D. 727.

Cases.

It will be observed that the language of the present section is "notice of an act of bankruptcy, available against him." Having regard to the provisions of s. 6, these words appear to limit the necessity for notice to acts of bankruptcy occurring within three months of the presentation of the petition. Such was the construction put on the similar expression in ss. 94 and 95 of the Act of 1869; *Ex p. Gilbey*, 8 Ch. D. 248.

Rose v. Hart,
an authority
upon mutual
credits.

Under the Act of 1849, s. 171, there were, it will be observed, two classes of cases in which the right of set-off was expressly given. 1. Where there were mutual debts. 2. Where there had been mutual credits. It is upon the second of these two classes that *Rose v. Hart* has been a leading authority. It has been cited when the question has occurred,—does a particular state of dealings amount to a *mutual credit* between the bankrupt, and some person claiming to set off a cross demand against his estate?

Development
of doctrine of
mutual credit.

The first case bearing upon this question was *Ex p. Prescott*, 1 Atk. 230, where the claimant owed the bankrupt a debt, payable *in futuro*, and the bankrupt owed him one payable *in presenti*. Lord Hardwicke said that this constituted, not indeed a *mutual debt*, but a *mutual credit*. The cases soon multiplied; and it was settled that, in order to render credits *mutual*, within the bankruptcy laws, it was not necessary that the bankrupt and the creditor should particularly *intend* to trust each other, or to raise cross demands. This was settled in *Hankey v. Smith*, 3 T. R. 507, n., where A.'s acceptance got into B.'s hands, and B. bought goods of A., who did not know that the bill was in B.'s hands.

Construction
given to words
“mutual
credits.”

After Lord Hardwicke had, in *Ex p. Prescott*, pointed out the distinction between *mutual debts* and *mutual credits*, the latter term was frequently relied on, and there was a struggle to bring within its meaning many demands which could not possibly have ranged within the former term. It has been seen from the discussion in the text, that in *Ex p. Deeze*, 1 Atk. 228, these words received a very large construction; which was narrowed by *Ex p. Ockenden*, Id. 234; and that these cases were followed by a string of decisions, beginning with *French v. Fenn*, Cooke, B. L., 8th ed., 565, A.D. 1783, and extending over a period of more than thirty years, during which *French v. Fenn* was the leading case upon this subject.

Credits which
must or tend
to terminate
in debts.

At last, in 1818, *Rose v. Hart* was decided, and the rule established, which has ever since prevailed, namely, “that *mutual credits*, within the meaning of the bankrupt laws, are *credits which must in their nature terminate in debts*.” And this it is submitted means, not, as has been contended in some cases, credits which must, *ex necessitate rei*, terminate in debts, but credits which have a natural tendency to terminate in debts, not in claims differing in nature from a debt. Thus it was settled in *Smith v. Hodson*, 4 T. R. 211, that

an accommodation acceptance is a *credit*, given by the acceptor to the party accommodated; and yet it is not *certain* to end in a debt, for the party accommodated ought to provide for the bill at maturity, and, if he do, there will be no debt.

The cases between *French v. Fenn* and *Rose v. Hart* were all recognised by the latter case, and stated by Gibbs, C.J., to be reconcilable with, and supported by, his decision. It will therefore be necessary to review them before proceeding to the cases subsequent to *Rose v. Hart*. *French v. Fenn* itself is well abridged by Gibbs, C.J., in the text, and is well epitomised by the same learned judge, while at the bar, in his argument in *Smith v. Hodson*, *ante*, p. 146, so that it is unnecessary to repeat the facts here at length. It is a very remarkable case, and was long the leading decision on this subject; and, excepting the overruled case of *Ex p. Deeze*, and the later decision of *Easum v. Cato*, *post*, p. 300, goes perhaps further than any case upon this branch of the bankruptcy law. *Smith v. Hodson*, 4 T. R. 211, is reported at length, *ante*, p. 142, being the leading case upon another equally important point. As far as it bears on the present subject, it was expressly approved of in *Hulme v. Muggleston*, 3 M. & W. 30.

Review of
authorities.

French v.
Fenn.

Smith v.
Hodson.

In *Atkinson v. Elliott*, 7 T. R. 378, the defendant sold the bankrupt a parcel of tars for 430*l.* at six months' credit, for which the bankrupt accepted a bill, and afterwards bought another parcel for 230*l.* on the same terms. On the first bill becoming due, he gave the defendant two bills on third parties, making together 600*l.*, and the defendant undertook on their being paid to return 170*l.*, it not being intended to do more than take up the bill accepted for the price of the first parcel. In an action for the 170*l.*, the defendant was allowed to set off his demand for the second parcel.

Atkinson v.
Elliott.

In *Ex p. Boyle, re Shepherd*, 15 Aug., 1803, Cooke, B. L., 8th ed., 571, Lord Cork, to accommodate Shepherd, his solicitor, drew four notes, two payable to Nibbs or order, and two to Shepherd or order. He was forced to take up one of them before the bankruptcy, and two afterwards; and the question was, whether these payments could be set off against a debt due from him to Shepherd's estate. Lord Eldon at first thought that the account must be taken as it stood at the time of the bankruptcy, and that the debt could not be set off against the mere liability on which no

Accommoda-
tion accept-
ances; *Ex*
parte Boyle.

payment was made till after the bankruptcy; but afterwards he said he had considered the case, and was of opinion, that the petitioner was entitled to set off against the debt the payments *after* the bankruptcy. That an accommodation acceptance, not paid by the acceptor till after the bankruptcy, can be set off against the estate of the party accommodated, was also decided in *Ex p. Wagstaff*, 13 Ves. 65; and these cases were cited with approbation by Parke, B., in *Hulme v. Muggleston*, 3 M. & W. 30.

*Sheldon v.
Rothschild.*

In *Sheldon v. Rothschild*, 8 Taunt. 156, Otte drew a bill on B. & Co. for 400*l.*, which they accepted without value. They afterwards owed Otte 237*l.*, and drew on him for 163*l.*, the balance. This bill they sold to the defendant, and afterwards became bankrupts, the 400*l.* bill remaining in Otte's hands unpaid. Otte accepted without notice of the bankruptcy, and paid the 163*l.* to the defendant, on which, the assignees of B. & Co. brought an action as for money had and received; but the court held that there was a mutual credit between the bankrupts and Otte, and that, inasmuch as Otte could have set off his demand on the estate in any action brought against him, the defendant, who stood in his place, might do so also.

Law settled by
Rose v. Hart.

The next decision is the principal one of *Rose v. Hart*, which is reported in the same volume with *Sheldon v. Rothschild*. Gibbs, C.J., who had argued, when at the bar, in *Smith v. Hodson*, delivered the judgment, which was one of the last pronounced by that distinguished judge. This case settled the law upon the subject; the subsequent decisions turning all of them on the applicability of the rule, promulgated in *Rose v. Hart*, to particular states of fact.

*Easum v.
Cato.*

A very remarkable case on this part of the bankruptcy law is *Easum v. Cato*, 5 B. & Ald. 861, where the doctrine of mutual credit was perhaps carried further than in any case since *Rose v. Hart*. In *Easum v. Cato*, D., being desirous of making a shipment at his own risk, but not in his own name, represented to M., the merchant through whom the shipment was to be made, that the goods were A.'s; and procured A. to write to M. to insure, and make advances on the goods, which was done. Afterwards D. became bankrupt, and subsequently M. received the proceeds of the goods, deducted for his advances, and paid the balance to A. In an action brought by D.'s assignees against A. for this balance, the court held that A. might set off a debt due to him from D., considering, apparently, that D. had, in

effect, actually put the goods into the hands of A. with a right to receive the proceeds.

With this decision it is, perhaps, not easy to reconcile that in *Young v. Bank of Bengal*, 1 Moo. P. C. 150. There P. obtained advances from the bank, depositing negotiable securities, with an authority to the bank to sell them at the end of three months for their reimbursement, rendering back any surplus to P., who undertook to make up any deficiency. P. became bankrupt within the three months, and, the bank having afterwards sold the securities and realized a surplus, the question arose whether there could be a set-off between the surplus and an independent debt due from P. to the bank. The Privy Council, reversing the judgment below, held that there could not be, and their decision purports to be founded, not on the special promise to repay the surplus, but on the uncertainty at the time of the bankruptcy whether any debt capable of being set off would ever arise from the sale of the securities.

*Young v.
Bank of
Bengal.*

Young v. Bank of Bengal was much commented on in *Alsager v. Currie*, 12 M. & W. 751, where Parke, B., placed the decision on two grounds: 1st, that there was no mutual credit, as the securities had been deposited with the bank for a particular purpose (see *Wright v. Watson*, C. & E. 171; *Eberle's Hotels v. Jonas*, 18 Q. B. D. 459, 470); 2nd, that it was the assignees' duty to redeem the paper immediately, and, if they had done so, no debt would have been due in respect of the loan.

Explained in
*Alsager v.
Currie*, by
Parke, B.

In *Naoroji v. Chartered Bank of India*, L. R. 3 C. P. 444, the plaintiffs entrusted the defendants with bills for collection, and subsequently executed a deed of inspectorship (which was equivalent to an adjudication of bankruptcy) at a time when they owed the defendants 8335*l.* Afterwards they sued the defendants for the proceeds of the bills, which the defendants had collected partly before, and partly after, the date of the deed. The defendants claimed to set off the 8335*l.*, and the court, distinguishing *Young v. Bank of Bengal*, held that they might do so, it being immaterial whether the proceeds of the bills were collected before or after the date of the deed, because at that date the authority to do so had not been revoked. There is an error in the head note to the report of this case in the L. R., as it is there stated that, at the date of the deed, the sum sued for was actually collected and in the hands of the defendants, in which case no question of mutual *credit* could have arisen;

*Naoroji v.
Chartered
Bank of India.*

see the report in 18 L. T. 358, where the case is fully set out. See also *Astley v. Gurney*, L. R. 4 C. P. 714, where a similar question was discussed in the Exch. Cham.; *Elliott v. Turquand*, 7 App. Cas. 79, in the Privy Council; *Palmer v. Day*, (1895) 2 Q. B. 610.

Groom v. West.

In *Groom v. West*, 8 A. & E. 758, an agreement to pay the bankrupt for goods sold prompt two months, or by acceptance, was held a claim against which a debt due from the bankrupt might be set off.

Distinction between acceptance and indorsement.

The nature and extent of the rule laid down in *Rose v. Hart* are well illustrated by *Rose v. Sims*, 1 B. & Ad. 521, and *Gibson v. Bell*, 1 B. N. C. 743: in the former case it was held that an agreement to indorse a bill of exchange did not create such a credit as the statute intends: in the latter, that an agreement to accept a bill did create such a credit. These cases turned on the distinction between an acceptance, which creates a debt, and an indorsement, which creates only a suretyship; see *Wallis v. Swinburne*, 1 Exch. 203.

Hulme v. Muggleston.

In *Hulme v. Muggleston*, 3 M. & W. 30, to an action for money had and received to the use of the assignees of S., the defendant pleaded that, before notice of the bankruptcy, he indorsed a bill for S.'s accommodation, and discounted another for him, both of which he was obliged to take up after the bankruptcy; that, before the bankruptcy, S. lent him a cheque, the proceeds of which he received after the bankruptcy, which was the same money now sued for, and against which he claimed to set off the amount of the dishonoured bills. The court held the plea good. To the same effect is *Russell v. Bell*, 8 M. & W. 277, which is not quite so strong a case as *Hulme v. Muggleston*, the credits being accommodation acceptances, as in *Smith v. Hodson*, instead of indorsements, as in *Hulme v. Muggleston*.

Bittleston v. Timmis.

In *Bittleston v. Timmis*, 1 C. B. 389, the Court of C. P. held that a demand which originated before fiat, and before notice of any act of bankruptcy, could be set off against a claim for money had and received to the use of the assignees, arising out of a credit given by the bankrupt before fiat, and before notice of any act of bankruptcy.

Credit to acceptor of bill or maker of note.

In *Collins v. Jones*, 10 B. & C. 777, it was laid down by Bayley, J., that "whoever takes a bill must be considered as giving credit to the acceptor; and whoever takes a note, credit to the drawer;" see *Arbouin v. Tritton*, Holt, N. P. 408; *Edmeads v. Newman*, 1 B. & C. 418.

Holder must not be mere agent.

In *Belcher v. Lloyd*, 10 Bing. 310, a distinction was

engrafted on this rule; namely, that the holder of the bill or note, to be within the statute, must not be a mere agent, holding it for a third person's benefit. In that case, M.'s assignees sued L. & Co., acceptors of a bill for 1000*l.*, drawn by the Commercial Bank, and indorsed to M. When M. became bankrupt, L. & Co. had in their hands a bill for 760*l.*, drawn by a Scotch firm in which M. was a partner, accepted by a London firm in which he also was a partner, and indorsed by the Commercial Bank. This bill became due on the very day on which M. stopped payment, whereupon L. & Co. protested it; and, having in their hands sufficient assets of the Commercial Bank to discharge it, debited the bank with the amount, and sent them the protested bill, with a receipt for it. The bank sent back the bill, requesting L. & Co. to set off its amount against their own acceptance for 1000*l.*; and the question was, whether they had a right to do so. The court held not. "Can it be said," asked Bosanquet, J., "that the defendants are creditors of M., and hold the bill on their own account? If not, and if they hold the bill as mere trustees for the Scotch house, as such trustees they are not entitled to set it off against a demand made on themselves in their own right."

Similar to this decision was *Lackington v. Combes*, 6 B. N. C. 71, where to an action by the assignees for the price of a phaeton, which had been sold by the bankrupt to the defendant, on ready-money terms, the latter endeavoured to set off a dishonoured acceptance of the bankrupt, in which he had no real interest, but which he had obtained from the holder for that purpose. It was held that he was not at liberty to do so. See *Fair v. M'Iver*, 16 East, 130; *Forster v. Wilson*, 12 M. & W. 191; *London, &c., Bank v. Narraway*, 15 Eq. 93.

Lackington v. Combes.

That the demands in respect of which a set-off can be claimed must be in the same right is well established; see *West v. Pryce*, 2 Bing. 455; *Ex p. Whitehead*, 1 G. & J. 39; *Staniforth v. Fellowes*, 1 Marsh. 184; *Groom v. Mealey*, 2 B. N. C. 138; *Wood v. Smith*, 4 M. & W. 522; *Yates v. Sherrington*, 11 Id. 42, 12 Id. 855; *Forster v. Wilson*, 12 Id. 191; *New Quebrada Co. v. Carr*, L. R. 4 C. P. 651; *Re Pollitt*, (1893) 1 Q. B. 455. An equitable claim, however, is sufficient, where it is to a simple liquidated ascertained trust fund; see *Bailey v. Finch*, L. R. 7 Q. B. 34; *Bailey v. Johnson*, L. R. 7 Ex. 263; as explained in *Ex p. Morier*, 12 Ch. D. 491.

Demands must be in same right.

Equitable claims.

In *Alloway v. Steere*, 10 Q. B. D. 22, where a bankrupt's trustee had not disclaimed a tenancy, and so became liable as assignee on the covenants in the lease, and at its expiration had claimed, as he was entitled to do, the value of tillages from the landlord, it was held under the Act of 1869 that the landlord could not set off the rent due at the date of the bankruptcy from the bankrupt; see *Ex p. Hastings*, 62 L. J. Q. B. 628.

The peculiar right of set-off founded on the mutual credit clause of the Bankruptcy Acts exists, in case of a bankruptcy, only as between the trustee of the bankrupt and the debtor to the estate. It cannot be made available in an action brought by the bankrupt as trustee for a person to whom he has assigned his equitable interest before the bankruptcy; *Boyd v. Mangles*, 16 M. & W. 337; see *Re Asphaltic Co.*, 30 Ch. D. 216, 225.

Unliquidated
damages.

It was formerly held that no set-off by way of mutual credit could be pleaded to a claim by the assignees of a bankrupt resulting from the misapplication by the defendant of money placed in his hands by the bankrupt for the purpose of meeting his acceptances, such claim having been held to be for unliquidated damages; *Bell v. Carey*, 8 C. B. 887; *Hill v. Smith*, 12 M. & W. 618; see now, however, *Booth v. Hutchinson*, 15 Eq. 30, *post*, p. 305. But even under the former Acts, a claim in respect of a loss on a policy of insurance might, before adjustment, have been set up as a mutual credit, although it is not a debt within the statutes of set-off; *Beckwith v. Bullen*, 8 E. & B. 683; see also *Koster v. Eason*, 2 M. & S. 112; *Parker v. Beasley*, Id. 423; and *Lee v. Bullen*, 8 E. & B. 693, n.

Any demand
proveable
might be set
off under
former
statutes.
Abbott v.
Hicks.

It must be borne in mind that any demand proveable under the fiat might, by the express words of 6 Geo. 4, c. 16, s. 50, be set off. On the other hand, a demand could not be set off that would not have been proveable under the fiat. See *Abbott v. Hicks*, 5 B. N. C. 579. A. B. & C. dissolved partnership, the firm owing H. 51,891*l.*, and A. owing the firm 6,817*l.* They agreed that A. should pay B. & C. the 6,817*l.*, and that B. & C. should keep the stock and assets of the firm, and should pay H. : B. & C. became bankrupts while 47,000*l.* remained still due to H. Held that A. could not set off his liability to pay this sum in an action against him by the assignees. "If," said Erskine, J., "in consequence of the bankruptcy he had paid the whole to H. he might have proved under the commission, and any debt or

demand provable under the commission may be set off where there has been mutual credit. But here, as there has been no payment, there is no debt or demand, and the defendant has given no credit to the bankrupts, nor is this one of the contingent debts provided for by s. 56, on which the commissioners are to put a value in order to proof. It is no debt at all, and, as the defendant may never be called on to pay it, it would be impossible to put a value on it. —This is not a debt payable on a contingency, but a mere liability which may or may not become a debt hereafter.”

It will have been observed that the conclusion of s. 171 of the Act of 1849, which section corresponded, as we have seen, with s. 50 of the Act of 1825, enacted in similar terms that every debt or demand made provable against the bankrupt's estate might be set off.

Set-off of debts
provable
against estate.

The right of proof against the bankrupt's estate was successively extended so as to embrace various kinds of contingent liabilities by 6 Geo. 4, c. 16, ss. 51 and 56; 12 & 13 Vict. c. 106, ss. 172 and 173; 24 & 25 Vict. c. 134, ss. 153 and 154; and 32 & 33 Vict. c. 71, s. 31, all of which are now repealed. The right of proof is now governed by s. 37 of the Bankruptcy Act, 1883, which is so wide in its terms as to include every possible liability arising out of a contract. Upon the scope and interpretation of the similar section of the Act of 1869, see *Ex p. Llynvi Co.*, 7 Ch. 28; *Ex p. Peacock*, 8 Id. 682; *Ex p. Waters*, Id. 562; *Ex p. Blake-more*, 5 Ch. D. 372; *Ex p. Bolland*, 8 Id. 225; *Hardy v. Fothergill*, 13 App. Cas. 351.

It remains to consider what effect has been produced by the introduction of the words “other mutual dealings” in the Act of 1869 and the present Act.

Mutual
dealings.

In *Booth v. Hutchinson*, 15 Eq. 30, which was the case of a deed incorporating the provisions of the Act of 1869, it was held that a claim for damages for breach of covenant which were unascertained at the date of the deed might be set off against the claim for rent due and accruing due to the insolvent estate up to the time of the distribution of the estate under the deed. In delivering judgment, Malins, V.-C., said, “If the case were under the old law I should probably have concluded that there was no right of set-off, but the old decisions rested on the construction which the courts had put upon the words ‘mutual debts’ and ‘mutual credits.’ The language of the Act of 1869 is altered from that of the previous Acts and made more comprehensive. I must

Booth v.
Hutchinson.

therefore conclude that the right of set-off given by the previous Acts was considered to be too restricted, and was intended to be enlarged."

Right of set-off not in terms extended to every provable demand.

That such was the intention of the Legislature is rendered more probable by the very wide terms of s. 31 of the late, and s. 37 of the present Act, as to proof of debts. For although those sections do not, like s. 171 of the Act of 1849, provide in express terms that every provable demand may be set off, yet, since every liability *arising out of contract* is now capable of proof, and is consequently barred by the bankrupt's order of discharge (see s. 30), to hold that the right of set-off is narrower than the right of proof would bring about the anomalous result, to meet which the doctrine of mutual credit was introduced (see *ante*, p. 295). For the creditor would be precluded from setting off claims which he would nevertheless be debarred from asserting by action, and would therefore be obliged, while discharging his own liabilities in full, to receive back from the bankrupt's estate only a dividend in respect of such liabilities of the bankrupt towards himself.

Ex parte Price.

Ex p. Price, 10 Ch. 648, was a case decided upon the peculiar nature of the valuation put upon the claim of a policy-holder in the winding up of an insurance company. The policy-holder had himself gone into liquidation, being indebted to the insurance company. On proof by the liquidators of the company against the estate of the debtor, it was held that the trustee could not set off the estimated value which had been put upon the policy. This case was distinguished in *Sovereign Assurance Co. v. Dodd*, (1892) 1 Q. B. 405, 2 Id. 573, where it was held that a policy-holder, whose policy had matured after the presentation of the winding-up petition against the company, might set off the amount due on the policy against a claim for a debt due from him to the company, in an action by the liquidator to recover the debt, brought after the policy had matured.

Sovereign Assurance Co. v. Dodd.

Ex parte Barnett.

In *Ex p. Barnett*, 9 Ch. 293, which was decided upon the Act of 1869, Lord Selborne guarded himself from expressing an opinion upon the effect of the additional words. In that case, B. & Co. had had business transactions with a trader who became bankrupt, and at the time of the bankruptcy the bankrupt owed them 3,010*l.*, and they owed the bankrupt 88*l.*, in respect of which sum he had a lien upon goods of B. & Co. in his possession. On a claim by the trustee in bankruptcy that B. & Co. should pay the 88*l.* in

full, and should prove for the whole sum of 3,010*l.* against the bankrupt's estate, it was held that the latter were entitled to have the sum of 88*l.* set off against their claim so as to free the goods from the lien, and to prove for the balance against the bankrupt's estate.

However, in *Ex p. Bolland*, 8 Ch. D. 225, Bacon, C.J., put a somewhat narrower construction on the Act. In that case a contractor failed to carry out his contract, and went into liquidation. There was a clause in the contract empowering the employers to use the plant left by the contractor on the premises in case of his default, and a portion had accordingly been used up by another contractor duly substituted under the contract. The balance remaining unused was sold by agreement, and the sum realised was claimed by the trustees. The employers sought to set off the damages sustained by them through the breach of contract, contending that there had been mutual dealings between them and the debtor, in respect of which they were entitled to the set-off. This contention the learned judge overruled, being of opinion that, inasmuch as the employers acquired no property in the plant, but only a right to use it in a certain event, there had not under the circumstances been a dealing in respect of the sum realised.

*Ex parte
Bolland.*

In *Peat v. Jones*, 8 Q. B. D. 147, the C. A. followed *Booth v. Hutchinson* in holding the clause applicable to a claim for unliquidated damages for breach of contract, and held that such a claim might be set off in a common law action brought by a trustee in liquidation. In *Jack v. Kipping*, 9 Q. B. D. 113, it was held that a claim for fraudulent misrepresentation on the sale of a chattel by a bankrupt may be set off against a claim by the trustee for the price. When an executory contract is broken by reason of the bankruptcy, the damages for the prospective loss may now form the subject-matter of a set off; see *Re Asphaltic Co.*, 30 Ch. D. 217, 221.

Peat v. Jones.

A right of set-off, however, cannot arise, unless there have been "mutual dealings," and the mutual dealings must be such as result in pecuniary liabilities giving rise to an account in which sums due on one side may be set off against sums due on the other, and a balance struck; *Eberle's Hotels v. Jonas*, 18 Q. B. D. 459. In this case it was held that, in an action by the trustee for detention of goods, a money claim against the bankrupt's estate could not be set off.

"Mutual
dealings"
such as will
result in
pecuniary
liabilities.

"There are, no doubt, matters, which give rise to claims, but are not dealings within the section. If one man assaults

"Dealings."

another, or injures him through negligence, that gives rise to a claim, but is not a dealing; but I am disposed to think that whatever comes within the description of an ordinary business transaction would be a dealing within the section;" *per* Lord Esher, *Eberle's Hotels v. Jonas, supra*.

The set-off under the section is not optional, but compulsory, and it seems that the existence of security does not affect its operation; *Ex p. Barnett, supra*; and see *McKinnon v. Armstrong*, 2 App. Cas. 531.

Set-off in administration of deceased insolvent's estates, and in winding up of companies.

S. 10 of the Judicature Act, 1875, imports the rule of set-off, with the other rules in force for the time being under the law of bankruptcy as to debts and liabilities provable, into the administration by the court of the assets of persons whose estate is insufficient for the payment of their debts, and into the winding up of companies. See *Mersey Steel Co. v. Naylor*, 9 App. Cas. 434; *Re Asphaltic Co.*, 30 Ch. D. 217; *Eberle's Hotels v. Jonas*, 18 Q. B. D. 459; *Sovereign Co. v. Dodd*, (1892) 1 Q. B. 405, 2 Id. 573; *Sankey Brook Co. v. Marsh*, L. R. 6 Ex. 185; and *Re Washington Co.*, (1893) 3 Ch. 95, which shows that in a winding-up the right of set-off is not so extensive as in bankruptcy.

Gibson v. Bell, per Tindal, C.J.

The history of this head of the bankruptcy law down to that date is so clearly, and at the same time briefly, sketched by Tindal, C.J., in *Gibson v. Bell*, 1 B. N. C. 743, 753, that this note cannot be better concluded than by extracting it.

"The principle," said his lordship, "which the bankrupt laws seem to have had in view, from the earliest time to the last provisions made therein, is this, that where two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the account shall be settled between them, and the balance only payable on either side. That this was the practice of the commissioners of bankrupt, long before any statutory provision on the subject, appears clear from the two earliest decided cases, *Anonymous*, 1 Mod. 215, before North, C.J., and *Chapman v. Derby*, 2 Vern. 117. The first statute which made any express provision on the subject was the expired statute 4 & 5 Anne, c. 17. By that statute it was enacted in s. 11 'that where there hath been mutual credit given between the bankrupt and any debtor, and the accounts are open and unbalanced, it shall be lawful for the commissioners, or assignees, to adjust the account; and the debtor shall not be compelled to pay more than shall appear to be due on such balance.' This provision of the expired statute of

Anne is re-enacted in s. 28 of 5 Geo. 2, c. 30, with some variation in the expression, that section enacting, that 'the commissioners, or assignees, shall state the account between them, and one debt may be set against another, and what shall happen to be due on either side, on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively.' This statute continued in force until 46 Geo. 3, c. 135, s. 3, which provides that where there hath been mutual credit given, or mutual debts between the bankrupt and any other person, 'one debt or demand may be set against the other, notwithstanding any secret act of bankruptcy before committed.' The same language is continued in the last statute, 6 Geo. 4, c. 16. So that from the earliest practice to the latest provision by statute the object seems to have been, that the account should be stated as between merchant and merchant, and that whatever would be in ordinary practice a pecuniary item in such account should be the subject of set-off."

PRICE v. THE EARL OF TORRINGTON.

TRIN. 2 ANNE.—CORAM HOLT, C.J., AT GUILDHALL.

[REPORTED 1 SALKELD, 285.]

In an action for beer sold and delivered, in order to prove the delivery, a book was put in, containing an account of the beer delivered by the plaintiff's draymen, and which it was the duty of the draymen to sign daily. The drayman who had signed the account of beer delivered to the defendant being dead, the book was admitted in evidence on proof of his handwriting.

THE plaintiff, being a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was that the draymen came every night to the clerk of the brew-house, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their hands; and that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery; otherwise of the shop-book itself singly, without more (a).

(a) See *Higham v. Ridgway*, *post*, 1 Id. 283; 6 Mod. 264; 2 Lord Raym. p. 317; 7 Jac. I. c. 12; 2 Salk. 690; 873.

Distinction
between
entries
against
interest and
those in
course of
business.

THE books supply repeated instances in which entries of a deceased person, *contrary to his own interest*, have been, after his death, received as evidence of the facts stated by him in those entries. (See *post*, pp. 317, *et seq.*) But the decision in the principal case seems hardly to fall within that class of authorities, for, as is remarked by Mr. Phillipps, in his "Law of Evidence," such a declaration by a tradesman's servant as that made by the drayman in *Price v. Torrington* is clearly distinguishable from entries in the book of a receiver, who, by making a gratuitous charge against himself, knowingly against his own interest, and without any equiva-

lent, repels every supposition of fraud. A disposition to commit fraud would have tempted the receiver to suppress altogether the fact of his having received anything, or to misrepresent the amount, but not to misstate the ground or consideration upon which it was received—*i.e.*, not to misstate the only fact sought to be established by the proposed evidence. On the other hand, the declaration of the tradesman's servant is given in evidence to prove the fact of delivery, and as he gives the account not against his own interest, which is some security for the truth of the statement in the other case, the probability of his account being true or false is neither greater nor less than the probability of his being honest or dishonest, which is nothing more than may be said of every case of hearsay. The circumstance of his thereby acknowledging the receipt of goods, which, it may be said, would be evidence in an action against him, seems to amount to little or nothing. It was the least he could say. To say nothing at all would, as he must have known, necessarily lead to inquiry.

Price v. Torrington falls within the class of cases thus described by Taunton, J.: "A minute in writing, made at the time when the fact it records took place, *by a person since deceased, in the ordinary course of his business*, corroborated by other circumstances, which render it probable that the fact occurred, is admissible in evidence;" *Doe v. Turford*, 3 B. & Ad. 890. In that case a landlord instructed B. to give the defendant notice to quit, and B. communicated the instructions to his partner P., who prepared three notices to quit, two of them for service on other persons, and three duplicates, and then went out; on his return P. handed to B. the three duplicates, which he had meanwhile endorsed. It was proved that the other notices were served as intended, that the defendant afterwards asked not to be compelled to quit, and that it was the invariable practice of the clerks of B. & P., who usually served such notices, to indorse on duplicates a note of the fact and time of service. The duplicate in question, being so indorsed, was admitted, after P.'s death, to prove the service of the notice on the defendant.

Entries in
course of
business.

Doe v.
Turford.

The former cases on this subject will be found cited and discussed in *Doe v. Turford*; it will therefore be unnecessary to advert to them at length in this note; see *Pitman v. Maddox*, 2 Salk. 690; *Hagedorn v. Reid*, 3 Camp. 377; *Champneys v. Peck*, 1 Stark. 404; *Pritt v. Fairclough*, 3

Poole v. Dicas. Camp. 305, *et notas.* In *Poole v. Dicas*, 1 B. N. C. 649, a bill became due and was left with a notary to demand payment; M. the notary's clerk went out, returned, and, in one of the notary's books into which the bill had been previously copied, wrote in the margin "No effects;" another clerk made a similar entry in another book from M.'s dictation; all this was done in the regular course of business; the court held that after M.'s death the entry made by him was admissible to prove the dishonour of the bill. "We think it admissible," said Tindal, C.J., "on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine of business, by a person who had no interest to misstate what had occurred."

Entry in
course of
business
must have
been made
at the time.

Parke, J., in his judgment, in *Doe v. Turford*, remarks a distinction between the admissibility of an entry of this description, and of an entry admitted in evidence because against the interest of the party making it. "It is to be observed," said his lordship, "that, in case of an entry falling under the rule as being an admission against interest, proof of the handwriting of the party and his death is enough to authorise its reception; at whatever time it was made, it is admissible. But, in the other case, it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry;" 3 B. & Ad. 890, 898; see *Turner v. Hutchinson*, 3 L. T. 815; *Ryan v. Ring*, 25 L. R. Ir. 184.

Evidence of
those things
only which it
was duty of
deceased to
enter.

Secus, where
against
interest.

Chambers v.
Bernasconi.

An entry admissible after the maker's death because made in the course of business is, however, evidence of those things only which, according to the course of that business, it *was the duty* of the deceased person to enter; whereas, if admissible as against interest, it would be evidence of any other things contained in the declaration, and substantially connected with the same subject-matter; *R. v. Birmingham Churchwardens*, 1 B. & S. 763; *R. v. Exeter Guardians*, L. R. 4 Q. B. 341. In *Chambers v. Bernasconi*, 1 Tyr. 335, 4 Id. 531, this distinction was engrafted upon the rule laid down in *Doe v. Turford*. In that case it became material to ascertain the place where one Chambers had been arrested. The under-sheriff of Middlesex, being called, produced the writ, and stated that by the course of his office the bailiff making an arrest was required immediately afterwards to transmit to the office a memorandum of the arrest, and that for the last few years

an account of the place where the arrest took place had also been required from him ; it was then proved that the bailiff who arrested Chambers was dead, and the following memorandum in his handwriting, taken from the files of the office, was tendered in evidence to prove the place where he made the arrest.—“9 Nov. 1825. I arrested A. H. Chambers the elder only in South Molton Street, at the suit of W. Brereton.—Thomas Wright.”

The memorandum was held by both the Court of Exch. and the Exch. Cham. inadmissible for the purpose for which it was offered. “The ground,” said Lord Denman, delivering the judgment of the Exch. Cham., “on which the attorney-general first rested his argument for the plaintiff in error, was not much relied on by him, *viz.*, that the certificate was an admission against the interest of the party making it, because it renders him liable for the body arrested. He had recourse to a much broader principle, and laid it down as a rule, that an entry made by a person deceased, in the course of his duty, where he had no interest in stating an untruth, is to be received as proof of the fact stated in the entry, and of every circumstance therein described which would naturally accompany the fact itself. The discussion of this point involved the general principles of evidence, and a long list of cases determined by judges of the highest authority, from *Price v. Torrington*, before Holt, C.J., to *Doe v. Turford*, recently decided by Lord Tenterden in the King’s Bench. After carefully considering, however, all that was urged, we do not find it necessary, and therefore we think it would not be proper, to enter upon that extensive argument ; for as all the terms of the legal proposition above laid down are manifestly essential to render the certificate admissible, if any one of them fails the plaintiff in error cannot succeed ; and *we are all of opinion that whatever effect may be due to an entry made in the course of any office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances.* Admitting then, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being

Entry of facts not necessary to performance of a duty inadmissible.

merely collateral to the duty done." See *Lloyd v. Wait*, 1 Phil. 61.

Remarks on
Chambers v.
Bernasconi.

It is difficult, in perusing *Chambers v. Bernasconi*, to avoid remarking that, although professing to steer wholly clear of the doctrine promulgated in *Doe v. Turford*, it still seems hardly reconcilable in its facts with that decision; for it was proved in *Chambers v. Bernasconi*, and is indeed stated in Lord Denman's judgment, that the course of the office of the sheriff of Middlesex is to *require* a return in writing of the arrest, *and of the place where it is made*, under the hand of the officer making it. Now, in ordinary parlance, it certainly would be said to be the officer's *duty* to comply with the course of the office by returning the *place* of arrest, and had he refused to do so he would probably have been discharged. And it is difficult to see how an entry which he was required to make, and had not the choice of omitting, could be more collateral to his duty than the entry of the service of the notice to quit was to that of the person making it in *Doe v. Turford*; and it seems obvious that the entry of the *place* of arrest might prove of utility to the officer's employer, the sheriff, since, if an action of trespass were brought against him by the party arrested, he would, in order to his defence, be obliged to show that he arrested him within the county: so that a knowledge of the precise spot where the caption took place might be very useful to him. But, however difficult it may be to reconcile *Chambers v. Bernasconi* with *Doe v. Turford*, it may be safely stated that the former case has not shaken the general doctrine promulgated in the latter, since the attention of the Common Pleas was drawn to both in *Poole v. Dicas*, 1 B. N. C. 649, where the authority of *Doe v. Turford* was expressly recognised; and Tindal, C.J., and Parke, J., both stated that the decision in *Chambers v. Bernasconi* turned wholly on the circumstance that the officer had gone beyond the sphere of his duty in making an entry of the *place* of arrest. See *De Rutzen v. Farr*, 4 A. & E. 53, in the report of which there seems to be some mistake; *Milne v. Leisler*, 7 H. & N. 786, *per* Pollock, C.B.; also *Marks v. Lahee*, 3 B. N. C. 408; *Clark v. Wilmot*, 1 Y. & C. C. C. 53, corrected 2 Id. 259, n.; *Pickering v. Bishop of Ely*, 2 Id. 249; *Lloyd v. Wait*, 1 Phil. 61. In *Doe v. Hawkins*, 2 Q. B. 212, the account admitted was written by a clerk (still living and not called) of the deceased officer, but it had been adopted by the officer as his own.

In *Davis v. Lloyd*, 1 Car. & K. 275, it appeared to be the practice of the Jews to circumcise on the eighth day after birth, and to be the duty of the chief rabbi to perform the rite, and to make an entry thereof in a book kept at the synagogue. The death of the chief rabbi being proved, such an entry was offered in evidence to show the age of a Jew, but Lord Denman, after consulting Patteson, J., rejected it, probably on the ground that the duty of the chief rabbi did not spring from any relation recognised by law. *Davis v. Lloyd.*

In *Brain v. Preece*, 11 M. & W. 773, it was the course of business for H., one of the workmen at a coal-mine, to give notice of the coals sold to the foreman Y., who, not being able to write, employed another man to enter the sales, and the entries were afterwards read over to him. H. and Y. being dead, the entries were held not to be evidence, apparently on the ground that they were not made by a person having direct knowledge of the facts or a person employed by him; and Lord Abinger observed that, "as regards *Price v. Torrington*, it is better to adhere to that case as it stands, and not to give any extension to it." Where it was the usual practice for minutes of the proceedings of a college to be entered in a book, and to be signed by the registrar, an unsigned entry made by the person who usually wrote the entries was held to be inadmissible in evidence; *Brain v. Preece.*
Fox v. Bearblock.
Fox v. Bearblock, 17 Ch. D. 429.

The rule to be collected from all the cases is that, "it is an essential fact to render such an entry admissible, that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates and then to make a report or record of it;" *per* Blackburn, J., *Smith v. Blakey*, L. R. 2 Q. B. 326; see also *The H. Coxon*, 3 P. D. 156; *Polini v. Gray*, 12 Ch. D. 411, and in H. L. *sub nom. Sturla v. Freccia*, 5 App. Cas. 623; *Massey v. Allen*, 13 Ch. D. 558; *Trotter v. Maclean*, Id. 574. In *Rawlins v. Rickards*, 28 Beav. 370, however, an entry made by a deceased solicitor in his books relating to a deed prepared by him and executed by a deceased person was admitted as evidence that the deed had been executed; but see *Hope v. Hope*, W. N. 1893, p. 20; and in the *Dundonald Peerage Case* an entry in a deceased solicitor's books, and in his handwriting, recording an interview with Lord Dundonald upon a particular day, was admitted as evidence of the fact Rule of cases.

that his lordship had been in London at that date ; see pp. 112, 137 of Minutes of Evidence.

The declarations of a deceased witness to a deed tending to show that he was concerned in forging it are inadmissible ; *Stobart v. Dryden*, 1 M. & W. 615. In that case it was not argued that they were declarations against interest, nor could that have been successfully argued according to the *Sussex Peerage Case*, 11 Cl. & Fin. 85 (*post*, p. 340).

Statements
against
interest.
Parol state-
ments.

For the law as to admissibility of statements against the interest of the person making them, see *Higham v. Ridgway*, which is printed next, and the note ; and, as to parol statements being equally admissible with written ones, see the same note ; and *Stapylton v. Clough*, 2 E. & B. 933 ; *Eddie v. Kingsford*, 14 C. B. 759 ; *Turner v. Hutchinson*, 3 L. T. 815 ; *R. v. Birmingham Churchwardens*, 1 B. & S. 763.

HIGHAM *v.* RIDGWAY.

TRINITY, 48 GEO. 3.—IN THE KING'S BENCH.

[REPORTED 10 EAST, 109 (10 R. R. 235).]

If a person have peculiar means of knowing a fact, and make a written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death. And therefore an entry made by a man-midwife, who had delivered a woman of a child, of his having done so on a certain day, referring to his ledger, in which he had made a charge for his attendance, which was marked as *paid*, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery.

UPON error brought to reverse a recovery suffered by Wm. Fowden, the younger, of certain lands in the county palatine of Chester, of which he claimed to be first tenant in tail under indentures of the 16th and 17th of December, 1763, it appeared that the premises were limited in remainder to the first son of the body of Wm. Fowden the father, in tail, with remainder to the second and other sons in tail, remainder to the daughters in tail; under which last limitation the plaintiff Elizabeth claimed, in default of heirs male of Wm. Fowden the father, as heir of the body of Mary, his only daughter. The record set forth the recovery, which was of the session at Chester on the 16th of April, 29 Geo. 3, and appeared to have been acknowledged at Macclesfield on the 15th of April, 1789, and that an affidavit was sworn on that day by Wm. Morley, Wm. Fowden, sen., and Mary, the wife of John Orme, in which Wm. Fowden, sen., swore "that Wm. Fowden the younger was born on the *second* of April, 1768, but that, being a Protestant Dissenter, no entry was made of his baptism in any register." And Mary Orme swore "that she was aunt to Wm. Fowden, jun., and well remembered that he was born in the beginning of April, and before the 15th day of that month, in the year 1768." And the error assigned was, that it appeared in the record, &c., that Wm. Fowden, jun., on Friday, in the aforesaid session at Chester,

appeared by attorney and warranted the tenements, &c., to E. (the tenant), &c.; but that Wm. Fowden, jun., was then an infant within the age of twenty-one years, *viz.*, twenty years and no more. And on joinder in error, the issue was, "Whether Wm. Fowden the younger, at the time of his appearance and warranty, and voucher to warranty, and also at the time of the giving of the said judgment (of recovery), was an infant within the age of twenty-one years, to wit, of the age of twenty years and no more."

At the trial at Chester it appeared that Wm. Fowden, jun., died on the 31st of December, 1792, having before made his will, and Wm. Fowden, sen., the father, died on the 20th of March, 1806; but Mary Orme, the aunt, was still living, and examined as a witness by the defendant in support of the fact as sworn to in her affidavit; but the accuracy of her recollection as to the precise day of her nephew's birth was rendered doubtful by circumstances which came out upon cross-examination. And on the part of the plaintiffs it was, amongst other things, proved by a neighbour that Wm. Fowden the father, and his wife, lived at Bramhall, where William the son was born; that it was on a Friday. That he was desired by the father to fetch Mr. Hewitt, the man-midwife, who lived at Stockport, about three miles and a half distant: the witness, however, had occasion to go elsewhere, and another person was sent to Mr. Hewitt, and on the witness's return the same evening Mrs. Fowden was brought to bed of a son. That the wife of Richard Fallows, who lived half a mile off, was also delivered on the same day. The person who was sent to Mr. Hewitt's corroborated this account, and knew young Fallows and young Fowden, as they grew up, who appeared about the same age. Another witness also proved the birth of young Fowden on a Friday (the particular day of the week was proved by reference to market day and other collateral circumstances by the several witnesses), and that he saw Mr. Hewitt at Fowden's house. Fallows, the son, also proved his growing up with Wm. Fowden, the son; that they used to dispute which was the eldest; but they were both born on the same day; and he had been told this by Fowden's father and mother. His own birth-day was on the 22nd of April. Other witnesses also deposed to the same effect. John Hewitt was then called, the

son of the man-midwife who delivered Mrs. Fowden ; and he proved the death of his father twenty years before, and produced certain books (on which the question of evidence arose), in which his father had been used to make regular entries of all matters relating to his business, with their dates, immediately on his return home ; and the entries in question were proved to be in his father's handwriting. These entries were tendered in evidence to show the precise day of the birth of Wm. Fowden, jun. The evidence was objected to ; but the court determined to receive it, reserving the point. The entries in question (which were preceded and followed in order of time by others of the like nature) were as follows :—

✓

“ 22nd April, 1768.

38 (a) Richard Fallows's wife. Bramhall. *Filius circa hor. 9, matutin : cum forcipe, &c.*
paid.”

Then followed in the same page the entry in question, without any intervening date.

“ ✓ Wm. Fowden, junr.'s (b) wife, 79 (c).
filius circa hor. 3 post merid. nat. &c.”

“ Wm. Fowden, junr., 1768.

Aprilis 22. *Filius natus, &c.*

Wife	1	6	1
26th. <i>Haustus purg</i>	0	15	0

Pd. 25th Oct., 1768.”	2	1	1
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The jury found, on this evidence, that Wm. Fowden, jun., who suffered the recovery, was not born on the 2nd, but on the 22nd of April, 1768.

Topping and *Yates* showed cause against a rule for a new trial, and contended that the entries in question, proved to be in the handwriting of the man-midwife, and to have been regularly made from time to time in the course of his business, were evidence of the time of the birth of Wm. Fowden, the son, as

(a) The figures 38 referred to the question.
ledger.

(b) This was the designation at that time of the father Wm. Fowden, jun., in

(c) These figures referred to the ledger, the entry in which follows.

having been made by a person possessing a competent knowledge of the fact, and discharging the party on whom he had a claim in the first instance for his medical attendance. Similar evidence has been admitted in other cases. In *Warren d. Webb v. Greenville* (*d*) the question was, Whether there had been a surrender of part of the estate, which was in jointure to the widow at the time of the recovery suffered by the son, tenant in tail: without which there was no good tenant to the præcipe for that part and the recovery was ineffectual for so much. It was insisted that a surrender should be presumed at that distance of time (*e*); and to fortify that presumption, the debt-book of the family attorney, who was dead, was produced, wherein he charged so much for suffering the recovery, including several items for drawing and engrossing the mother's surrender; all which charges appeared by the book to have been paid. And this was held to be good evidence, after the death of the attorney, who, if living, might have been examined to the fact. This report of the case is in the main confirmed, as to this point, by Lord Mansfield, in *Goodtitle d. Bridges v. The Duke of Chandos* (*f*); with this addition, that a receipt had been given upon the bill, which contained the articles, for drawing and engrossing the surrender. Though Lord Mansfield seems to have thought that Sir John Strange had not laid sufficient stress in his report upon the presumption arising from the length of time. So rentals, or stewards' accounts, with *payments* marked on them, are always received in evidence (*g*), even against third persons. In *Herbert v. Tuckal* (*h*), upon a question whether one was of full age when he made his will, an entry made by his father in an almanack of the day of his son's birth, was allowed by the court, on a trial at Bar, to be strong evidence: and yet that was no question of pedigree, and therefore not within the exception which allows the hearsay declarations of the family to be evidence in such cases, any more than the declaration of a father as to the *place* of his son's birth, which was rejected as evidence in *The King v. The Inhabitants of Erith* (*i*).

(*d*) 2 Str. 1129.

(*e*) The recovery was in 1699, and the trial in 1740.

(*f*) 2 Burr. 1065, 1072.

(*g*) 12 Vin. Abr. 90, tit. *Evidence*, pl.

13 & 14. *Barry v. Bebbington*, 4 T. R. 514; and *Stead v. Heaton*, Id., 669.

(*h*) T. Ray. 84.

(*i*) 8 East, 539.

Manley. Serjt., and *John Williams*, *contra*.—The question whether these entries be evidence cannot depend on their apparent accuracy, but on this: whether the declarations of a third person, by parol or in writing, as to a fact which may be supposed to have been within his knowledge at the time, can, after his death, be given in evidence, merely because, in the same breath or writing, he admitted that a claim of his own respecting such fact, if true, had been discharged. Ever since the case of *The King v. Eriswell* (*k*), it has been considered that *hearsay* is not evidence of a particular fact, except in proof of a pedigree; and that exception has always been confined to the strict fact in issue of descent or primogeniture in proof of pedigree; and has always been rejected in collateral inquiries; as of the place of birth, upon a question of settlement, in *The King v. Erith*. And perhaps the case of *Herbert v. Tuckal*, which might have been a question between the heir-at-law and devisee, may have passed as a question of pedigree, without adverting to this distinction. Now here the precise fact in issue was, “Whether Wm. Fowden, the younger, at the time of his appearance and warranty, &c., was an infant within the age of twenty-one years?” &c., in which no question of pedigree is involved. But not even in questions of pedigree have the declarations of any others than members of the family been received in evidence; and the evidence given here was of the declaration of a stranger; for such the apothecary must be taken to be. The admissibility, therefore, of the evidence stands wholly upon the ground that the entry made by him, taken altogether, discharged his own claim. All the cases on this head rest upon the original authority of *Warren d. Webb v. Greenville* (*l*), which, by the explanation afterwards given of it by Lord Mansfield (*m*), turned mainly upon the presumption of the surrender arising from lapse of time; and his very solicitude to explain this shows that he was not so well satisfied of the admissibility of the entries in the attorney’s bill-book, which he says was strongly litigated; and he concludes his observations by saying that Sir J. Strange’s report is incorrect. Both in *Barry v. Bebbington* (*n*), and in *Stead v. Heaton* (*o*), the persons whose

(*k*) 3 T. R. 707, and see *R. v. Ferryfrystone*, 2 East, 54, where the question was finally set at rest.

(*l*) 2 Stra. 1129.

(*m*) In *Goodtitle v. Duke of Chandos*, 2 Burr. 1072.

(*n*) 4 T. R. 514.

(*o*) Id. 669.

entries were given in evidence had in the first instance charged themselves with the receipt of money for which they were accountable to others, to whom their accounts were delivered; but where the entries of the receipt of rent had been made by the owner of the estate himself, as in *Outram v. Morewood* (p), they were held not to be evidence even to prove the identity of the land in a cause between other persons. And on the same principle Lord Kenyon, in the case of *Calvert v. The Archbishop of Canterbury* (q), ruled that an entry of an agreement for a pair of horses, made in the plaintiff's books by his servant, who was dead, was not evidence to charge the defendant for the hire of them, because the servant did not thereby charge himself. So this, being an entry made merely for the party's own use, must be considered as *res inter alios acta*. The case of *Roe d. Brune v. Rawlings* (r) went on a different ground; for there the letter written by a former steward of the estate to the then tenant for life, containing a particular of the ancient rents, &c., was by him handed down amongst the muniments of the estate to the succeeding tenant for life, and preserved by each *against his own interest*, as an authentic document; and on this ground it was held to be evidence of the ancient rent against the lessee of the last tenant for life, by whose acknowledgment of the fact such lessee was bound. They also noticed that the apothecary's discharge of his demand was not made upon the entry as to the time of the child's birth, but only in the ledger to which the entry referred. And they observed upon the dangerous consequence of introducing a laxity in the rules of evidence by extending the exceptions of hearsay evidence of particular facts beyond the strict question of pedigree, and that class of cases where entries had been made by stewards and such like, to charge themselves in account with the payment over of sums they had received in right of others, to whom those accounts were delivered.

LORD ELLENBOROUGH, C.J.—I should be extremely sorry if anything fell from the court upon this occasion which would in any degree break in upon those sound rules of evidence which have been established for the security of life, liberty, and

(p) 5 T. R. 121.

(q) 2 Esp. 646.

(r) 7 East, 279.

property; but, in declaring our opinion upon the admissibility of the evidence in question, we shall lay down no rule which can induce such ruinous consequences, nor go beyond the limits of those cases which have been often recognised, beginning with that of *Warren v. Greenville*. The question is, Whether the books of a man-midwife attending upon a woman at the time of her delivery and making charges for such his attendance, which he thereby acknowledges to have been paid, are evidence of the time of the birth of the son, as noted in those entries? That the books would be evidence in themselves, as recording this event of the birth, and other similar events, in the course of his attendance on his patients, at the several times when they took place, I am by no means prepared to say. Nor is my opinion in this case formed with reference to the declarations of parents, &c., received in evidence, as to the birth or time of the birth of their children. But I think the evidence here was properly admitted, upon the broad principle on which receivers' books have been admitted; namely, that the entry made was in prejudice of the party making it. In the case of the receiver, he charges himself to account for so much to his employer. In this case the party repelled by his entry a claim which he would otherwise have had upon the other for work performed, and medicines furnished to the wife; and the period of her delivery is the time for which the former charge is made, the date of which is the 22nd April; when it appears, by other evidence, that the man-midwife was in fact attending at the house of Wm. Fowden. If this entry had been produced when the party was making a claim for his attendance, it would have been evidence against him that his claim was satisfied. It is idle to say that the word *paid* only shall be admitted in evidence, without the context, which explains to what it refers: we must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged. By the reference to the ledger, the entry there is virtually incorporated with and made a part of the other entry of which it is explanatory. So far, therefore, the case of *Warren v. Greenville*, if it be law, is an authority in point to the present case. But it is supposed that, after the evidence of the solicitor's book there had been received, the court had repented of their decision, and put the case to the jury entirely on the presumption of a surrender from length

(Lord ELLENBOROUGH, C.J.)

of time. But how does that appear, either upon the report in *Strange*, or by what fell from Lord Mansfield, in the case in *Burrow*? *Warren v. Greenville* was decided in the year 1740, about forty years after the time when it was insisted that the surrender should be presumed to have been made. And to fortify that presumption, the report says that the defendant offered the attorney's debt-book in evidence, containing charges for drawing and engrossing the surrender, which it appeared by the book were paid. The evidence was objected to, but allowed by the court, who thought it material, upon the inquiry into the reasonableness of presuming a surrender, and not to be suspected to be done for this purpose. The entries were read accordingly. But the court afterwards declared "that, without that circumstance, they would have presumed a surrender; and desired it might be noticed that they did not require any evidence to fortify the presumption after such a length of time." Now, what is the fair inference to be collected from that report? Not that the court doubted at all whether the evidence of the entries in the book had been properly received; but that they were afraid that by fortifying and buttressing up, by this further evidence, a presumption so strong, from the mere lapse of time, they might be supposed to have weakened that presumption; which they wished to guard against. And this is in substance the account which Lord Mansfield himself gives of that decision in the case in *Burrow*. But he also states that the point of evidence was strongly litigated; which shows that it did not pass without much discussion and consideration: and his account of the fact there given in evidence, so far from showing the report to be incorrect, is a strong confirmation of it in the material circumstance. Here it appears distinctly from other evidence that there was the work done for which the charge was made; for the man-midwife was sent for by the father, and he attended at the house on the day when the mother was delivered; and the discharge in the book in his own handwriting repels the claim which he would otherwise have had against the father from the rest of the evidence as it now appears. Therefore the entry made by the party was to his own immediate prejudice, when he had not only no interest to make it, if it were not true, but he had an interest the other way,

not to discharge a claim which it appears from other evidence that he had. The evidence, therefore, in this case was properly received, as well upon the authority of the case of *Warren v. Greenville* as upon principle.

GROSE, J.—General rules of evidence are of the greatest consequence: for either admitting evidence of a fact when it should be excluded, or rejecting it when it ought to be admitted, would shake the security of all property: the right decision, therefore, of every case of this sort is of great importance. But it is very difficult sometimes to distinguish the nice shades of difference between cases of this description; and therefore I am always glad to find an express authority on which I can set my foot. The case of *Warren d. Webb v. Greenville* is of that sort, which ought not now to be called in doubt, having been confirmed in the subsequent case by Lord Mansfield, and since that again by this court. Relying, therefore, upon that authority, which applies most strongly to this case, I think the evidence was rightly admitted. And even without the entries, I think there was evidence sufficient to find the verdict which has been given, though those entries put the matter out of all question.

LE BLANC, J.—On inquiring into the truth of facts which happened a long time ago, the courts have varied from the strict rules of evidence applicable to facts of the same description happening in modern times, because of the difficulty or impossibility, by lapse of time, of proving those facts in the ordinary way by living witnesses. On this ground hearsay and reputation (which latter is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from one to another) have been admitted as evidence in particular cases. On that principle stands the evidence, in cases of pedigree, of declarations of the family who are dead, or of monumental inscriptions, or of entries made by them in family bibles. The like evidence has been admitted in other cases, where the court were satisfied that the person whose written entry or hearsay was offered in evidence had no interest in falsifying the fact, but, on the contrary, had an interest against his declaration or written entry; as in the case of receivers' books. I do not mean to give any opinion as to the mere declarations or written entries of a midwife who is dead,

(LE BLANC, J.)

respecting the time of a person's birth, being made of a matter peculiarly within the knowledge of such a person: it is not necessary now to determine that question; but I would not be bound at present to say that they are not evidence. But here the entries were made by a person who, so far from having any interest to make them, had an interest the other way; and such entries against the interest of the party making them are clearly evidence of the fact stated, on the authority of the case of *Warren v. Greenville*, and of all those cases where the books of receivers have been admitted. I understand the expressions used by Sir John Strange, in his report of that case, very differently from what they have been argued to mean. There was a presumption there of a surrender from the circumstances of the case, and from length of time; and besides that presumption so arising, there was a confirmation of it by the entry in question. The court only said that there was sufficient to presume the surrender, without the evidence of the entry; but not that they had any doubt that the entry was evidence. And this account of it is, I think, confirmed by Lord Mansfield, in the case in Burrow; who says that the point was much debated, and explains the observation made by Sir John Strange at the conclusion of his report. Then I cannot distinguish this from the case of *Warren v. Greenville*, nor from those of receivers' accounts, nor from *Roe d. Brune v. Rawlings*. The reasons given for admitting the evidence in the latter case apply also to the present, though I think in a much stronger degree. And I cannot agree to distinguish the entry from the ledger in favour of the objection; for, in the ledger in which Hewitt discharges his claim, the date is mentioned; but at any rate that is not weakened by its correspondence with the other entry.

BAYLEY, J.—This was no officious entry made by one who had no concern in the transaction: he had no interest in making it: and as he thereby discharged an individual against whom he would otherwise have had a claim, I think the entry was evidence by all the authorities. There were two entries read, the one following the other, without any intervening date; the first of these, relating to Fallows, is dated the 22nd April, 1768; and this is marked as *paid*: the next, as to Fowden, is not stated

there to be paid ; but it refers to a particular page in the ledger, where the charge against Fowden is made, including items, one of which is for delivering his wife, corresponding in date with the former entry ; and there he states himself to have been paid for his work and medicines. Therefore, if he had brought an action for his work, and had received notice to produce his books, this entry would have discharged the father. Now, all the cases agree that a written entry, by which a man discharges another of a claim which he had against him or charges himself with a debt to another, is evidence of the fact which he so admits against himself, there being no interest of his own to advance by such entry. In *Outram v. Morewood* the entry made was for the party's own interest who made it ; for he entered the receipt of rent from another person ; therefore, if that had been evidence for him, or for those claiming under him, it would have been furnishing evidence for himself of a right to the estate. But the principle to be drawn from all the cases, beginning with *Warren v. Greenville* down to *Roe v. Rawlings*, is, that if a person have peculiar means of knowing a fact, and make a declaration of that fact, which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his lifetime. And that principle has been constantly acted upon in the case of receivers' accounts.

Rule discharged.

IN *Price v. Torrington*, ante, p. 310, and the cases collected in the note to it, the entries, it will be remembered, were received upon the ground, that they were entries made by a person having knowledge of the fact entered, contemporaneously therewith, and *in a course of business*. Entries in course of business.

Higham v. Ridgway belongs to a different class of cases, those, namely, in which the entry has been received, because *against the pecuniary or proprietary interest* of the party making it. That this is a good reason for admitting an entry made by a dead person to be evidence, numerous decisions have established beyond all controversy ; and that this was the ground on which *Higham v. Ridgway* was decided, is clear, from the expressions of Le Blanc, J., who expressly guards himself from the supposition that he was Entries against interest.

delivering any opinion on the question whether the entries would have been receivable merely on the ground that they were made by a person having peculiar means of knowledge.

Distinction
where entry is
itself sole
evidence of
the charge of
which it
shows
payment.

Another observation which may be made on *Higham v. Ridgway* is, that though the entry certainly bore testimony to the creation of the very charge of which it showed the subsequent liquidation, and was, therefore, not only an entry *against* Hewitt's interests, so far as it showed *payment*, but also an entry *for* his interest, so far as it showed work done, for which he was entitled to be paid, still we must not infer that an entry, being itself the only evidence of the creation of the charge of which it shows the payment, is *admissible* in evidence. Indeed, *Doe v. Vowles*, 1 M. & Rob. 261, appears to be an express authority that such an entry is not admissible. In *Higham v. Ridgway* there was abundance of proof, *by witnesses*, that Hewitt was really called in, and really delivered Mrs. Fowden, so that the *parol* evidence showed clearly that a debt was due to him, and the only new facts introduced by the entry were the date and the discharge of it.

Doe v. Vowles.

Doe v. Vowles was an ejectment prior to 3 & 4 Will. 4, c. 27. The plaintiff was the representative of a mortgagee, and the question was, whether the possession of the defendant had been adverse to his title for the last twenty years. To prove that it had not been so, the plaintiff proposed to show that the mortgagee had repaired the premises while in defendant's occupation, and for this purpose he produced *a bill for the repairs, with a receipt for the amount*, in the handwriting of a deceased carpenter, which had been found among the mortgagee's papers. It was objected to the reception of this in evidence, that it was not an entry against the carpenter's interest; since, though it showed that his demand had been paid, it was also the only evidence that such a demand ever had existed. Counsel for the plaintiff cited *Higham v. Ridgway*; but Littledale, J., rejected the evidence, saying, "The cases have gone quite far enough; there would be no limit if such a paper as this were admitted."

Lord Ellenborough, in the principal case, seems to have pointed at this distinction, when he remarked: "Here it appears distinctly, *from other evidence*, that there was the work done for which the charge was made; for the man-midwife was sent for by the father, and he attended at the house on the day when the mother was delivered; and the

discharge in the book in his own handwriting repels the claim which he would otherwise have had against the father *from the rest of the evidence* as it now appears." And certainly the distinction is not an unreasonable one; for when it has been proved, by other unsuspicious evidence, that that part of the entry which makes in favour of the writer is no more than a true and honest statement, no mind can hesitate in coming to the conclusion that that part which is at variance with his interest is equally so, though, while the part which militates in the writer's own favour stood unconfirmed, suspicions might have been conceived that the whole statement was a fiction.

However, in *R. v. Lower Heyford* (Gloucester Summer Assizes, 1840), Parke, B., denied the existence of this distinction. It was an indictment against a parish for not repairing a bridge. To prove that the parish had repaired it, the book of a deceased mason was produced, containing charges against a deceased surveyor, with crosses marked against them to denote payments. Counsel for the defence objected to the book, and cited *Doe v. Vowles*; but the judge ruled that it was admissible, and expressly disapproved of *Doe v. Vowles*, saying he thought it contrary in principle to *Higham v. Ridgway*. The book afterwards proved to be unintelligible, and was rejected on that ground. In *Taylor v. Witham*, 3 Ch. D. 605, Jessel, M.R., approved and followed *R. v. Lower Heyford* in preference to *Doe v. Vowles*, in which latter case he thought the evidence had been improperly rejected.

R. v. Inhabitants of Lower Heyford.
Distinction denied by Parke, B.

Taylor v. Witham.

The qualification appended in the text by Bayley, J., to the general rule as to the admissibility of entries against interest, contained in the words "if he (*i.e.*, the party making the entry) could have been examined in his lifetime," was disapproved of in *Short v. Lee*, 2 Jac. & W. 489, and in *Gleadow v. Atkin*, 1 C. & M. 423, where the same learned judge, then baron in the exchequer, stated that he had doubts if he ever used the qualification: "My reason," said the learned baron, "for doubting if I used the expression is this, that, having at that time abstracted *Roe v. Rawlings*, and having that abstract before me at the time when I was giving my opinion, I was not likely to have introduced a qualification not warranted by that decision. My entry of the case of *Roe v. Rawlings*, in my own note-book, was, that the declaration of a person who has peculiarly the means of knowing a fact and has no interest in mis-stating

Qualification, "if deceased could have been examined in his lifetime" disapproved.

Gleadow v. Atkin, per Bayley, J.

it, is admissible, after his death, to prove that fact, and *a fortiori* would it be admissible, if the fact were against his interest. When I afterwards came to abridge *Higham v. Ridgway*, I find that I made the following entry—‘An entry by a man who is dead will be evidence as to strangers if it relates to a fact peculiarly within his knowledge, if he had no interest in misrepresenting it, or if the entry either charges him with the receipt of money for a third person, or imports that a debt which would otherwise be due to him is paid.’ There is not one single syllable in that entry as to the qualification, that he could be examined in his lifetime.”

Three points
stated by
Bayley, B.,
as decided in
principal case.

Semble, first
not decided.

Although this note of Sir John Bayley states three points as involved in *Higham v. Ridgway*—1. The admissibility of an entry made by a person who had no interest to misrepresent a fact peculiarly within his knowledge:—2. That of an entry charging the maker with receipt of money from a third person:—and 3. That of an entry importing that a debt, which would be otherwise due to the maker, is paid: it certainly does not appear that the other judges thought that they were establishing the first of these three propositions. On the contrary, Lord Ellenborough remarks: “That the books would be evidence in themselves, as recording this event of the birth, and other similar events in the course of his attendance on his patients at the several times when they took place, I am by no means prepared to say. . . . But I think the evidence here was properly admitted, on the broad principle on which receivers’ books have been admitted, namely, *that the entry made was in prejudice of the party making it.*” And Le Blanc, J., says: “I do not mean to give any opinion as to the mere declarations or written entries of a midwife, who is dead, respecting the time of a person’s birth, being made of a matter peculiarly within the knowledge of such a person. It is not necessary now to determine that question. But I would not be bound at present to say that they are not evidence. But here, the entries were made by a person who, so far from having any interest to make them, had an interest the other way; and such entries *against the interest of the party making them*, are clearly evidence of the fact stated.”

Entries by
persons
having
peculiar
knowledge.

The reader, if desirous of inquiring further into the admissibility of entries by a person having peculiar means of knowledge, may consult *Marks v. Lahee*, 3 B. N. C. 408; *Price v. Torrington*, ante, p. 310; *Sugden v. St. Leonards*, 1 P. D. 154; *Woodward v. Goulstone*, 11 App. Cas. 469.

There is this distinction between entries which are made in the usual course of business, and entries which are against the interest of the party making them: that in the former case only so much of the entry as it was strictly the duty of the party to make can be received; see *Chambers v. Bernasconi*, in the notes to *Price v. Torrington*, ante, p. 312; whereas in the latter case the entry is evidence, not merely of the fact of payment, but of the truth of other facts stated in it, though not against the interest of the party stating them; thus, in the principal case, the date of the birth was held to be proved by the entry. In *Doe v. Robson*, 15 East, 32, the entry of charges paid for a lease, as drawn on a certain day, was held to be evidence that the lease was so drawn; and for instances of the same kind see *Davies v. Humphreys*, 6 M. & W. 153; *Percival v. Nanson*, 7 Exch. 1, where Pollock, C.B., adverts to this distinction. The facts thus stated must, however, be part of the same entry, or connected with, or referred to by it; see *Doe v. Beviss*, 7 C. B. 456, *infra*, p. 335.

Distinction between entries in course of business, and entries against interest.

The reason for this distinction does not seem very obvious; for the principle upon which the two classes of entries are admitted is the same, namely, the improbability of their falsehood; and there seems no more reason for admitting the entry as evidence of facts, as to which that improbability does not exist, in the one case than in the other. In *Chambers v. Bernasconi*, already referred to in the notes to *Price v. Torrington*, ante, p. 312, the entry, "9th Nov., 1825, I arrested A. H. C. only, in South Molton Street, at the suit of W. B.," was held not to be evidence of the place, but only of the fact, of the arrest, the bailiff's duty only requiring the statement of the latter; but if the bailiff had added, "received for the same, five shillings," the statement of the place of arrest would have thereby become evidence of the fact, the probability of its truth not being in any way affected by the addition; see *per Parke, B.*, *Davies v. Humphreys*, 6 M. & W. 153, 166, and *per Williams, J.*, *Doe v. Beviss*, 7 C. B. 456, 514, *infra*, p. 335.

Quere, well founded.

It is now, however, well settled that declarations of deceased persons against their interest, pecuniary or proprietary, are receivable not only to prove so much contained in them as is adverse to the interest, but to prove collateral facts stated in them; at all events, so far as relates to facts which are not foreign to the declarations, and may be taken to have formed a substantial part of

Settled that declarations against interest receivable as to collateral matters.

them: see *per* Cockburn, C.J., in *R. v. Birmingham Overseers*, 1 B. & S. 763, where a parol declaration by the deceased father of a pauper's husband as to his occupation of a tenement as tenant *at a certain rent* was held to be admissible to prove the pauper's settlement; and *per* Pollock, C.B., in *Milne v. Leisler*, 7 H. & N. 786, 795.

Principal case followed.

Very many cases have occurred since *Higham v. Ridgway*, in which declarations and entries by persons deceased have been received in evidence as *against interest*. In *Spiers v. Morris*, 9 Bing. 687, entries by an executor, of his receipts, *as executor*, of the rent of lands, in which he had himself a remote interest, were received in evidence. For other instances in which entries, made by persons charging themselves with the receipt of money for which they were accountable, have been admitted, see *Whitnash v. George*, 8 B. & C. 556; *Dean of Ely v. Caldecott*, 7 Bing. 433; *Short v. Lee*, 2 Jac. & W. 464; *Stead v. Heaton*, 4 T. R. 669, cited in the text of the principal case; *Bullen v. Michel*, 2 Price, 399, 415; *Doe v. Cartwright*, Ry. & M. 62; *Exeter v. Warren*, 5 Q. B. 773.

Middleton v. Melton.

In *Middleton v. Melton*, 10 B. & C. 317, the entry by a deceased collector of taxes, of monies received by him, made in a book which he kept for his own private convenience, was held good evidence against his surety, though the persons from whom he received the money were alive, and might have been called as witnesses. It was objected that a collector's entries would be admissible only when made in a public book which it was part of his duty to keep in the course of business; a distinction countenanced by *Goss v. Watlington*, 3 B. & B. 132. The rule was, however, established to its utmost extent, "that" (to use the words of Parke, J.) "an entry made by a party cognisant of a fact, and having no interest to make a false entry, whereby he charges himself with the receipt of a sum of money, is evidence of the fact of the receipt of such money." And it was further held to make no difference that the entry in the private book was intended only as a preliminary to an entry in a public one. In *Gleadow v. Atkin*, 1 C. & M. 422, Bayley, B., adverting to *Middleton v. Melton*, said: "I think that lays this down as a general proposition, that an entry by a man *against his interest* is evidence against all the world."

Secus, of entries for interest.

On the other hand, no entry or declaration made by a private person which is *for his interest*, is receivable in

evidence against a stranger; *Plant v. Taylor*, 7 H. & N. 211, where the court rejected declarations made by a deceased person, who had married one woman (another, whom he had previously married, being then alive) as to the invalidity of the first marriage. In *The H. Coxon*, 3 P. D. 156, an entry made by the deceased mate of a ship two days after a collision tending to throw the blame upon the other ship was rejected. An entry which may prove to be for the interest of the party making for it, as a stockbroker's book recording transactions in stock, which may fluctuate, is to be rejected; *Massey v. Allen*, 13 Ch. D. 558.

It was stated, at the commencement of this note, that it seemed to follow from *Doe v. Vowles*, 1 M. & Rob. 261, coupled with Lord Ellenborough's observations in the principal case, that an entry is not admissible, as against interest, in which a man acknowledges the discharge of a debt, of the existence of which there is no evidence, save from the entry. *Doe v. Vowles* was, however, as we have seen, disapproved by Jessel, M.R., in *Taylor v. Witham*, 3 Ch. D. 605. And, even if *Doe v. Vowles* be law, the same rule does not necessarily apply to the case of a receiver charging himself with money on one side of an account, and discharging himself upon the other. It is true, indeed, that one part of the entry is *for his benefit*. Still, he does not *entitle himself* to anything positive, and, if he strike a balance against himself at the foot of the account, and acknowledge that balance to be unpaid, the result of the whole is clearly to his disadvantage. Even if the balance appear to be paid, the case is not like that of *Doe v. Vowles*; since, in an action brought against the receiver by his employer, the entry would be evidence against him, and the jury might, if they thought proper, or if evidence tending to that conclusion were produced, believe the part in which he charged himself with the receipt of monies, and disbelieve the part which went in his discharge. Whereas in *Doe v. Vowles* it would have been impossible to use that part of the entry which militated to the carpenter's disadvantage, without first positively admitting that which was for his advantage, inasmuch as the receipt assumes the existence of the debt admitted therein to have been received.

The question as to the admissibility of such an account was discussed in *Doe v. Tyler*, 6 Bing. 561. But it had previously received an express decision during the trial of the great case of *Rowe v. Brenton*; see 3 Man. & R. 267.

Where entry
sole evidence
of debt as
well as of
discharge.

*Rowe v.
Brenton.*

It arose as follows: a witness proved that his father was toller to the L. family; his memory did not go back so far as 1765, but he produced a book in his father's handwriting of that year, containing a debtor and creditor account of receipt of tolls, and said that as far back as his recollection went, his father used to keep similar books. Scarlett proposed to put in this toll-book, to which Brougham objected, arguing that "where a man charges himself with the receipt of money, that is taken to be evidence against him, because it is a declaration in writing against his own interest, and it is not to be presumed that a person would make such a statement unless it were true. But suppose there is, in part of the same document in which the charge appears, a discharge also which squares the account, or perhaps leaves a balance in his favour, then, taking the whole together, charge and discharge, both sides of the account, the reason fails, because it is no longer a declaration by a party *against his own interest*—it may be a declaration *for his own interest*." Littledale, J.—"A man is not likely to charge himself for the purpose of getting a discharge." Lord Tenterden, C.J.—"Almost all the accounts that are produced are accounts on both sides. That objection would go to the very root of that sort of evidence."

The same point was also decided by Patteson, J., in *Williams v. Geaves*, 8 C. & P. 592, upon the ground above taken, where the balance actually *was* in favour of the person making the entries.

Tendency of
modern
decisions.

Knight v.
Waterford.

The tendency, however, of the more recent decisions seems to be in favour of limiting the extent to which the admissibility of both sides of an account should be carried. In *Knight v. Waterford*, 4 Y. & C. 283, a steward's account contained on one side an entry, "April 16th, received of T. Watson, for half a year's rent, for the corn and petty tithes of H., due Whit-Sunday, 1759, £30;" and on the opposite side an entry in discharge of the former item, by payment or allowance to T. Watson, of 13s. for land-tax and poor rates on the tithes. It was sought to give both entries in evidence, and *Stead v. Heaton*, 4 T. R. 669; *Bullen v. Michel*, 2 Price, 399; and *Williams v. Geaves*, 8 C. & P. 592, were cited. Alderson, B., however, refused to receive the entry in discharge, expressing an opinion that *Stead v. Heaton* "goes to the extreme verge of the law;" and that all the reasons for the decision in *Bullen v. Michel* were not satisfactory; and his judgment was afterwards

approved of in *Doe v. Beviss*, 7 C. B. 456, when the subject underwent elaborate discussion.

In that case certain pipe rolls of a manor contained entries, by a deceased reeve, of receipts on one side and payments on the other; the judge at the trial refused to receive in evidence the entries of payments in the same account, not connected with or referred to by the entries of receipts, and the court held he was right in so doing, Williams, J., saying, "It seems to me, that the doctrine laid down in *Davies v. Humphreys*, upon the authority of *Higham v. Ridgway* and *Doe v. Robson*, that 'the entry of a payment against the interest of the party making it is to have the effect of proving the truth of other statements contained in the same entry, and connected with it,'—has gone quite far enough: I for one do not feel inclined to carry it any further." It is suggested in the marginal note to *Doe v. Beviss* that Wilde, C.J., who was absent when cause was shown, dissented from the judgment. See *ante*, p. 331, and *R. v. Birmingham Overseers*, 1 B. & S. 763.

There are a variety of other cases in which the entries or other declarations of deceased persons against their own interest have been held evidence as between strangers; for example, in *Ivat v. Finch*, 1 Taunt. 141, in an issue between A. and B., whether C. died possessed of certain property, C.'s declaration that she had assigned it to A. was held admissible. In *Peaceable v. Watson*, 4 Taunt. 16, the declarations of a deceased occupier of land were held admissible to show of whom he held it. "Possession," said Mansfield, C.J., "is *primâ facie* evidence of seisin in fee simple: the declaration of the possessor, that he is tenant to another, makes most strongly therefore against his own interest;" see *Doe v. Green*, Gow, 227; *Doe v. Jones*, 1 Camp. 367; *Davies v. Pierce*, 2 T. R. 53; *Holloway v. Rakes*, Id. 55; *De Bode's Case*, 8 Q. B. 208, 244; *R. v. Birmingham Overseers*, *supra*; and *R. v. Exeter*, L. R. 4 Q. B. 341, where, upon a question of settlement, a declaration and a written entry by a deceased occupier that he was tenant at a certain rent, and had paid it, were held admissible as evidence not only of the tenancy but of the payment. So a declaration, by a deceased owner, that his land does not extend beyond a particular limit, accompanied by an act of forbearance to transgress such limit, was held admissible; *Stanley v. White*, 14 East, 332, 339, 341. See also *Sly v. Sly*, 2 P. D. 91.

Other instances of entries or declarations held evidence against strangers.

Of assignment of property.

Of tenancy to another.

By owner as to limit of his land.

Declarations
by tenant in
derogation of
landlord's
title not
admissible.

*Papendick
v. Bridg-
water.*

But declarations by a deceased tenant against his own interest are not admissible when they are made in derogation of the landlord's title. Therefore, where a plaintiff claimed a right of common by prescription in respect of land, and the defendant tendered evidence to show that a deceased tenant for years of the land had declared that no such right existed, it was held that this evidence was properly rejected. In this case the admissibility of the evidence could not be rested on the ground of privity of estate, since the tenant has not the same as the reversioner, and Lord Campbell was of opinion that "it would be very mischievous, if it were in the power of a tenant to destroy a *profit a prendre* belonging to the land which he occupies, or to impose a servitude on it in such a way;" *Papendick v. Bridgwater*, 5 E. & B. 166.

As to hiring
to confer
settlement.

Reg. v. Worth.

In *R. v. Worth*, 4 Q. B. 132, in order to show that an alleged hiring was not such as to confer a settlement, an entry by the dead master in a book, in which it was his habit to enter the hirings of his servants, was tendered in evidence. The entry was as follows:—"April 4th, 1824. W. Worsell came; and to have for the half-year, 40s."—"Sept. 29th. Paid this 2*l.*"—"Oct. 27th. Ditto came again; and to have 1*s.* per week: to March 25, 1825, is 21 weeks two days: 1*l.* 1*s.* 6*d.*"—"25th. Paid this." It was held inadmissible, as showing merely a contract, which must be supposed to have been made on fair terms, and therefore not against the master's interest.

*Wynne v.
Tyrwhitt.*
Entries in
book of
steward of
manor.

In *Wynne v. Tyrwhitt*, 4 B. & Ald. 376, entries, more than thirty years old, charging a steward of the manor, and contained in his books, which were brought from the proper custody, were permitted to be read, without proof of the handwriting, or of the death.

*De Rutzen v.
Farr.* Entries
of rent to
prove title to
market.

In *De Rutzen v. Farr*, 4 A. & E. 53, in order to prove the plaintiff's title to a market, recourse was had to accounts of rent, found among his muniments. Some of these were accounts signed by a steward to the plaintiff's ancestor, wherein he charged himself with the amount of such rents. To these no objection was made. Others were signed, not by such steward, but by a person styling himself clerk to such steward. There was no parol evidence to show that this person ever was employed by the steward; but the papers were tendered as speaking for themselves. They were admitted at the trial, but held inadmissible by the court *in banc*, on the ground that they did not purport to charge the person whose signature they bore. But where

it was shown that the clerk had acted as clerk to the steward, who had recognised the accounts, the entries were held to be those of the steward, and admitted; *Doe v. Hawkins*, 2 Q. B. 212. In *Exeter v. Warren*, 5 Q. B. 773, to prove the receipt of port dues in ancient times, accounts purporting to be those of the receiver, and to be regularly audited according to the usual practice, but only signed by the auditors, were produced; an entry in one stated the receipt of a sum for dues by the receiver from one W., and with the entry was a paper of the same date as the entry, stating that W. had received a sum for dues corresponding within twopence with that in the entry; *the documents were thirty years old*; they were all admitted, although there was no evidence of the handwriting of the latter paper, and all the receipts were in the third person. See also *Musgrave v. Emmerson*, 10 Q. B. 326.

Mayor of Exeter v. Warren.
Entries as to port dues.

In *Doe v. Michael*, 17 Q. B. 276, a question as to the admissibility of old receipts arose upon peculiar facts which in some respects resembled those upon which the decision in *De Rutzen v. Farr* turned. In order to prove that certain lands were parcel of a manor, the plaintiff produced from his muniments two ancient books which purported to be the books of one John Vernon, steward to A. B., an ancestor of the plaintiff. In one of these books J. V. was debited, in 1782, with the receipt of rent for these lands. The balance of the account for the half-year was struck and entered in the book, but not signed. Under this entry was written, in a different hand, "The above balance is accounted for in a general statement at the end of the year's account, ending Michaelmas, 1793, entered in a subsequent book." This entry bore date the 18th Feb., 1795, and was signed by A. B., then owner of the manor, and by one John Vernon, *junior*. The balance was carried down in the account, and balances were struck in each half-year, which were always carried on into the next half-year's account. Similar entries to that mentioned above, signed not by J. V., but by J. V., junior, and A. B., were made under each consecutive half-yearly balance; and at the conclusion of the second book the final balance was struck, and 76*l.* was entered as the balance due to J. V. Underneath this was written, "18 Feb., 1795.—The above account was this day settled, and the balance 76*l.*, due thereon to J. V., senior, was paid by A. B. to the undersigned, J. V., junior, and the vouchers delivered up to A. B." This entry was signed by A. B.,

Doe v. Michael. Old receipts to prove parcels of manor.

and by J. V., junior. No evidence was given of the position of J. V., junior, or that he was dead, nor was there anything beyond the entries to show that he had ever existed.

Under these circumstances the court held that as the entry, showing that J. V., junior, charged himself with the receipt of the past balance, was produced from the proper custody, and purported to be fifty-five years old, it was not necessary to prove that he was dead; and that this entry, which was signed also by the then owner of the property, who thus treated J. V., junior, as a person accredited by and acting for the steward, was properly received in evidence. "I do not find fault," said Lord Campbell, "with the decision in *De Rutzen v. Farr*. As soon as we see that Protheroe, the clerk, in that case, neither charged himself, nor was shown to have authority to make his principal liable, it appears that the decision was right. But here John Vernon, junior, does charge himself with the receipt of money for which he is personally accountable. Besides, if it were necessary to resort to that, I think we cannot reject the part of the entry which is signed by the late A. B., and in which John Vernon, junior, is accredited in accounting with him."

Doe v.
Wittcomb.

Another question with reference to the admissibility of an old entry by a deceased person arose in *Doe v. Wittcomb*, 6 Exch. 601, 4 H. L. C. 425, but there the evidence was tendered mainly on the ground that the entry had been made in the discharge of a duty. This was an ejectment in which the question arose whether lands known as *Kingston Pastures* were part of the Manor of Hayling. The lands had been purchased from the Duke of Norfolk. The plaintiff, in order to prove that the lands were part of the manor, tendered in evidence an entry in a book found among the muniments of the Norfolk family. This entry, which bore date in 1610, and had been apparently made by the then steward of the family, stated shortly the terms of an indenture which recited a lease made by the Earl of Arundel, and which, tracing the lands into the possession of an undertenant of the Earl, went on to say that "J. L. (the undertenant) demiseth and granteth unto R. H. *all those pasture groundes lyinge in Kingston . . . parcel of the mannor of Hayling, containing,*" &c. It was contended that this entry was admissible on the ground that it was an official entry by the steward in the discharge of his duty. Search had been made, but without success, for the lease

referred to in this entry. The evidence was rejected at the trial, and it was held, in the Exch. Ch., and afterwards in the H. L., that the entry was a mere recital of some document which the writer had seen or heard of, and was not admissible either as an entry made in the discharge of a duty, or an entry against interest, or as evidence of reputation that the lands were parcel of the manor.

A question has in several cases arisen as to the applicability of the rule discussed in this note to cases in which the representative of the obligee of a bond or holder of a negotiable instrument sued on it after the time of limitation, or (in the case of a bond) of presumption of payment, had elapsed. In such cases, in order to avoid the effect which the lapse of time would otherwise have produced upon the right of action, indorsements made by the deceased acknowledging payment of interest were sometimes offered in evidence, and it was contended that they were admissible in proof of such payments, being against the interest of the party making them, and that they must be presumed to have been made at the time when they bore date.

In actions upon instruments after time of limitation or presumption of payment elapsed.

In such cases it seems that an indorsement of receipt of interest was admissible, as an entry against interest, if made before the time of limitation had run; *Searle v. Barrington*, 2 Str. 826; *Smith v. Battens*, 1 M. & Rob. 341; *Briggs v. Wilson*, 5 De G. M. & G. 12, per Turner, L.J.; but not so, if made after such time had run; *Turner v. Crisp*, 2 Str. 827; *Glynn v. Bank of England*, 2 Ves. sen. 38, 43; *Briggs v. Wilson*, *supra*. In *Rose v. Bryant*, 2 Camp. 322, Lord Ellenborough held that, to make such an indorsement admissible, extrinsic evidence must be given to show that it was made at, or recently after, the date which it bore; and this view was apparently upheld in *Gleadow v. Atkin*, 1 C. & M. 410, where Bayley, J., stated that he had discovered, by his own research, that evidence of the time when the indorsement was made was given in *Searle v. Barrington*, *supra*. As a rule, the date on the face of a document is, *primâ facie*, its true date; *Hunt v. Massey*, 5 B. & Ad. 902; *Goodtitle v. Milburn*, 2 M. & W. 853; *Sinclair v. Baggaley*, 4 Id. 312; *Anderson v. Weston*, 6 B. N. C. 296; *Potez v. Glossop*, 2 Exch. 191; *Morgan v. Whitmore*, 6 Id. 716; *Malpas v. Clements*, 19 L. J. Q. B. 435. In *Anderson v. Weston*, it is said that there is an exception to this rule in cases where a bill or note is produced to support a creditor's claim in bankruptcy; see *Wright v.*

Application of rule to actions *primâ facie* barred by statutes of limitation.

Proof of date of indorsement.

General rule as to dates on documents.

Lainson, 2 M. & W. 739, 743. In *Potez v. Glossop*, Parke, B., stated that he felt difficulty in seeing the reason of that exception.

Effect of
9 G. 4, c. 14,
s. 3.

Under Lord Tenterden's Act, s. 3, "no indorsement, or memorandum of any payment, written or made (since 31 Dec., 1828), upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed *sufficient* proof of such payment, so as to take the case out of the operation of" 21 Jac. 1, c. 16. In that section, "writing" means "the writing containing the contract by which the party is to be bound;" *per* Cresswell, J., *Bradley v. James*, 22 L. J. C. P. 193; and the section applies only to cases where the indorsement is the only evidence of payment, and then makes such indorsement, by itself, insufficient proof of payment; S. C., 13 C. B. 822.

Independent
entries after
statutes
have run.

In *Newbould v. Smith*, 29 Ch. D. 882, North, J., held, on the authority of *Briggs v. Wilson*, 5 De G. M. & G. 12, that an entry, in a mortgagee's books, of receipt of interest, made after the mortgage was *primâ facie* barred by the Statutes of Limitation, was not admissible in evidence, in a foreclosure action, for the purpose of ousting the statutes. In the C. A. and H. L. no opinion was expressed whether this entry was admissible or not; 33 Ch. D. 127, 14 App. Cas. 423.

By person
gone abroad
under criminal
charge.

It was attempted in *Stephen v. Gwenap*, 1 M. & Rob. 120, to extend the admissibility of entries against interest to the case of a man who had gone abroad under a criminal charge, and was not likely to return; but his entries were held inadmissible.

Parol declara-
tions. *Semble*,
on same
footing as
written.

A question has occasionally been made, whether declarations *not reduced to writing*, but militating against the interest of the party making them, are admissible as evidence after his death. In *Fursdon v. Clogg*, 10 M. & W. 572, the question, whether parol declarations by an agent of receipts could be proved after his death, was argued, but not decided. In *Stobart v. Dryden*, 1 M. & W. 615, the declarations of a deceased witness, tending to show that he was concerned in forging a deed, were held inadmissible; but not upon any distinction between oral and written declarations.

*Sussex Peerage
Case.*

So in the *Sussex Peerage Case*, 11 Cl. & Fin. 85, before the Committee for Privileges, assisted by the judges, in order to prove a marriage between the Duke of Sussex, son of George the Third, and Lady Augusta Murray, in 1793, it was proposed to give in evidence oral declarations made

by the clergyman who was alleged to have performed the ceremony, to his son, respecting the marriage, upon the ground that such declarations were against the clergyman's interest as admissions that he had contravened the Royal Marriage Act, 1772, and exposed himself to penalties. The Committee, although they rejected the evidence, upon the ground that the interest alleged to be affected was not *of a pecuniary nature*, yet never referred to any distinction between *oral declarations* and *statements reduced to writing*; indeed, they seem to have been put expressly on the same footing by Lord Campbell; so that, although the decision itself is not an authority against the existence of such a distinction, yet the judgments then delivered furnish strong grounds for inferring that none such would have been supported.

Lord Campbell also, in *Stapylton v. Clough*, 2 E. & B. 933, upon his opinion in the *Sussex Peerage Case* being cited, stated that he adhered to the doctrine there attributed to him; nor did the other judges dissent from his opinion, although the point was not expressly decided. See also *Edie v. Kingsford*, 14 C. B. 750, where it seems to have been taken for granted that oral declarations against interest would be equally receivable with written entries; *R. v. Birmingham Overseers*, 1 B. & S. 763; *R. v. Exeter*, L. R. 4 Q. B. 341, already cited, where a parol declaration was admitted; and *per Thesiger, L.J., Bewley v. Atkinson*, 13 Ch. D. 283, where a verbal admission by a deceased agent against the interest of his principal was admitted.

That a declaration can only be received in evidence as being against the interest of the party making it, when that interest appears to be *of a pecuniary or proprietary nature*, must, it is presumed, be taken to have been decided by the *Sussex Peerage Case*, and the cases above cited; although, as observed by Lord Lyndhurst and Lord Campbell, in the *Sussex Peerage Case*, the point was scarcely raised upon the facts, inasmuch as there was no ground for supposing that the clergyman, in making the alleged declaration, knew that he thereby subjected himself to any liability whatever. The judgment, however, clearly proceeded upon that ground, and Lord Brougham stated, p. 111, upon the authority of Williams, J., one of the judges present, and who had at the bar argued the case of *Higham v. Ridgway*, that the evidence was received in that case "on the express and specific ground, that it was an entry against *the pecuniary*

Interest must
be pecuniary.

interest of the party." Lord Campbell also observed, p. 113 : — "As to the point of *interest*, I have always understood the rule to be, that the declaration, to be admissible, must have been one which was contrary to the interests of the party making it, *in a pecuniary point of view*; and with the exception of *Standen v. Standen*, 1 Peake, 45, I do not know of any case which appears to break in upon that principle."

Entry must be against interest at time when made.

The entry must be against interest at the time when it is made. It is not enough that it may turn out afterwards to have been against interest. Therefore an admission by a deceased bankrupt in his statement of affairs that a debt is due from him is not admissible against the creditors, by reason that there might possibly afterwards turn out to be a surplus available for the bankrupt which the debt, if admitted, would diminish; *Re Tollemache*, 14 Q. B. D. 415; see *Massey v. Allen*, 13 Ch. D. 558.

Where entry act of ownership.

Besides the grounds of duty and interest there is another upon which an entry may be admissible against strangers, *viz.*, where it is an act of ownership, as, for instance, a lease or a license. This head of evidence is of much importance in proof of ancient possession; see *Malcolmson v. O'Dea*, 10 H. L. C. 593; *Bristow v. Cormican*, 3 App. Cas. 641.

DOE d. DIDSBURY v. THOMAS AND OTHERS.

TRINITY.—51 GEO. 3.

[REPORTED 14 EAST, 323 (12 R. R. 533).]

Generally speaking, hearsay evidence is not admissible in questions of private right.

Where a testator, between fifty and sixty years ago, devised land to his son for life, remainder to his grandson for life, remainder to the heirs of the body of the grandson, remainder to the lessor of the plaintiff in tail; between which latter and the defendant, the devisee in fee of the son, the question was whether the land in dispute, which had been occupied by the son in the lifetime of the testator, was part of the entailed estate, or had been acquired by his own purchase; evidence of *reputation that the land had belonged to Sir J. S., and was purchased of him by the first testator*, is not admissible; though coupled with corroborative parol evidence that the land had belonged to Sir J. S. before the occupation of it by the son, and also by a deed of conveyance of another farm in the same place from the first testator to a younger son about the same period, in which it was recited that the land thereby conveyed had been then lately purchased, *amongst other lands*, by the testator of Sir J. S.

THIS was an ejectment to recover a farm consisting of thirty-five acres of land, in the parish of Tideswell, in Derbyshire, which was tried at Derby, before Wood, B. Ann Didsbury, the lessor, claimed the premises under the will of Samuel White, dated 26 Nov., 1754, whereby he devised them by the description of “all those his closes, lands, and hereditaments, with the appurtenances, situate at Tideswell, then in the possession of his son, Richard White, to trustees (C. Flint, the lessor, being the executor of the surviving trustee), for a term of 500 years, in trust to raise 260*l.* for certain purposes; and subject thereto, to his son, Richard White, for life; remainder to his grandson, Richard White, for life; remainder to the heirs of the body of his said grandson, R. W.; remainder to the heirs of the body of his said son, R. W.; remainder over to other children.” The testator died in 1761. His son, Richard (who was baptized in 1716, and had been in possession of these premises in his father’s lifetime and

up to his death), continued in possession till his death in 1772, when he left a son, Richard (the grandson named by the testator Samuel), and a daughter, Ann, the lessor of the plaintiff. Richard, the grandson, who was born in 1750, entered upon the death of his father, and continued possessed till his death in 1803. He died without issue, and not having suffered a recovery, but made a will devising the premises to the defendants. On his death, Ann Didsbury, the lessor, claimed as heir of the body of the first Richard, the son of the testator, under the limitation in his will.

The only question made at the trial was whether Samuel White, the testator, was seised of these premises at the time of making his will and at his death; the plaintiff insisting that he was so seised; having, as it was alleged, purchased them of Sir John Statham, and permitted his son, Richard, to occupy them until his (the testator's) death. It appeared that the premises in dispute consisted of a farm called the Meadow Farm, originally seven closes, but now divided into nine, and in all thirty-five acres: and it was proved, by several witnesses, that one George Robinson, who was tenant to Sir John Statham, occupied the farm before the first Richard White had it; and that Richard took possession of it about sixty-one years ago, and continued possessed as long as he lived, and occupied no other land which could have been his father's during that time. That his father, Samuel, lived from ten to fourteen years after the first Richard was in possession of the farm. But another witness, who also deposed to the fact of the first Richard taking possession of and occupying the Meadow Farm at the same time when his brother, Edward White, occupied another farm called Foxlow's Croft, said that both farms were reputed to be Sir John Statham's, and to have been purchased by Samuel White of Sir John Statham at the same time. Then a deed was proved, dated 25 March, 1752, and made between Samuel White of the one part, and Edward White, one of his sons, of the other part; whereby Samuel White, in consideration of natural love and affection, &c., bargained and enfeoffed his son Edward, and his heirs, of all that farm, &c., within Tideswell, called Foxlow's Croft; all which said farm, &c., have been lately purchased amongst other lands and hereditaments by the said Samuel White, of and from Sir John Statham, &c.; habendum to Edward White in fee.

Objection was taken by the defendants' counsel to the evidence of reputation before stated; but the learned Judge was of opinion that, coupled with the deed above mentioned, the evidence was admissible. He thought that as it was in proof that Sir John Statham was the landlord of the Meadow Farm when it was occupied by G. Robinson before the first Richard White's occupation of it; and that as the deed also proved that Sir John Statham was also the owner of Foxlow's Croft, and that Samuel White had purchased that, amongst other lands and hereditaments, of Sir John Statham; and as it was also proved that both the sons (Edward and Richard) took possession of their respective farms at the same time; there was a sufficient basis laid to admit reputation that those other lands and hereditaments referred to in the deed were the Meadow Farm: and, after summing up the whole evidence, he left it to the jury; telling them that if in their judgment Samuel White were the owner of the Meadow Farm at the time of making his will, and at his death, Ann Didsbury was entitled to that farm as heir in tail under Samuel White's will: and in that case they would give their verdict for the plaintiff. But if they thought that Richard White, his son, had purchased the farm himself, or had acquired the ownership in it otherwise than under his father's will, then the defendants were entitled to it under the will of the last Richard. The jury found for the plaintiff.

Clarke, in last Easter Term, moved for a new trial, upon the ground of the objection taken at the trial against the admissibility of the evidence of reputation that the land at Tideswell, described in the will as then in the possession of the testator's son, Richard, had belonged to Sir John Statham, and was purchased of him by Samuel White, the testator. He insisted that in no case was reputation admissible to prove ownership or possession of private property. And a rule having been granted,

Vaughan, Serjt., now appeared on the part of the plaintiff, and admitting that reputation alone in a matter of private right was not admissible in evidence, contended that it was properly received when accompanied, as it was in this case, with the possession of the land at the time by the party to whom the evidence referred, and coupled as it was with the deed proved, the contents of which were confirmatory of the reputation. He

also suggested the inutility of the present application, even if the court should be of opinion that the evidence of reputation was not receivable, as there was other evidence sufficient to sustain the verdict: and he also stated that the lessor of the plaintiff, since the trial, had procured the original deed of conveyance of the land in question from Sir John Statham to the testator. Whereupon,

The court agreed that the rule must be made absolute: Lord Ellenborough, C.J., saying that it was very unfortunate for the lessor, where the verdict must be the same upon another trial, that they should be obliged to send the cause to trial again.

Rule absolute (a).

(a) The admissibility of evidence of this description has been vexata questio for many years in Westminster Hall, as the following notes, which I have taken from time to time, will suffice to show.

The following is the same case which is reported in 4 T. R. 157, for another point, which came on upon demurrer, in Hil. 31 Geo. 3, and where the plaintiff had leave to amend.

Morewood v. Wood, M. 32 Geo. 3, B. R.—Trespass for breaking and entering the plaintiff's close, called Swanwick Common, in the parish of Alfreton, in the county of Derby, and digging stones therein, and carrying them away, &c. The defendant pleaded, that there are certain wastes or commons lying open to one another, one called Swanwick Common, being the close in which, &c., the other called Swanwick Green, in Alfreton, &c.; and that he was seised in fee of a messuage and lands in Alfreton, in right of which he prescribed for the liberty of digging for and carrying away all necessary flags and stones in Swanwick Common, and in Swanwick Green, for the repair of his houses, fences, &c. The plaintiff replied, that he was lord of the manor of Alfreton, and that the defendant of his own wrong committed the trespass. The defendant, in his rejoinder, insisted on his prescriptive right as stated in the plea; on which issue was joined. At the trial before Hotham, B., at Derby assizes, the defendant called many witnesses, who proved that, for between sixty and seventy years past, he and those from whom he claimed had been in the constant exercise of the right stated in his plea; in many instances to the knowledge of the lord, who had threatened to bring actions, and been dared to do so by the defendant's ancestors, who insisted on their right. On the other hand, the plaintiff produced a presentment in 1717, of the freeholders of the court baron of the manor of Alfreton, of which the plaintiff is lord, and which presentment was signed by one Robert Wood, the foreman, and others; which name of Robert Wood was proved to tally with the subscription (1) to the will of Robert Wood, the grandfather from whom the defendant claimed, and which will was produced from the registry. One of the items in that presentment was, "if any person gets stone without leave of the lord of the manor, we pain him 10s." The plaintiff also called another witness to prove that, in a conversation with the defendant's uncle, from whom the defendant also claimed, the uncle had

(1) See *Roe v. Rawlings*, 7 East, 282.

admitted that the lord of the manor had the right, and he would not be beholden to him for the stone. The jury found for the defendant. Thus much appeared on the judge's report, on a motion for a new trial. But the plaintiff's counsel stated further (which was admitted by the other side, and so taken by the court), that the learned judge had rejected other evidence which they had tendered, and for which alone the new trial was moved for, viz.—

1st. Other presentments of a similar nature to the one received in evidence; but to which no subscription could be proved by any person from whom the defendant claimed; this was offered as evidence of reputation.

2nd. General parol evidence of reputation, that none but the lord had a right to dig stone, &c., on the locus in quo.

A rule nisi having been granted, Chambre, Clarke, Sutton, Willis, and Ascough contended, in support of their rule, that a general custom or prescription, covering all the estates of the tenants of the manor, might clearly be proved by evidence of reputation; and that there was no solid distinction between that case and the case of a particular prescription. There were no title deeds in the one case more than in the other, to which, as to a more certain criterion, reference could be had. In both instances the right rested on memory of particular instances of the exercise of it. In the case of a modus, reputation is evidence; and yet that relates to a particular estate. In *Bishop of Meath v. Lord Belfield*, in 1747, cited in Bull. N. P. 295, it was held that evidence of reputation was admissible in a quare impedit, that one Knight had been in by the presentation of Lord R.; which is a stronger case than this. The case of *Webb v. Petts*, Noy, 44, was clearly the case of a modus for a particular farm; and there the court held hearsay evidence to be sufficient. Such evidence as this is also admissible in the case of a manorial custom; and yet the public have as little to do with the custom of a particular manor as with a private prescription. Other persons in the parish may claim the same right as the defendant; and then it might have been laid as a custom; in which case these presentments would have been decisive evidence against it. So that by laying it as a prescriptive right annexed to each farm, instead of a custom, all the lord's proof of his right is gotten rid of; and the tenants may give in evidence those very tortious acts as evidence of a prescription, all which united together could not have supported a custom against the positive written testimony subscribed by all their ancestors who were tenants. Here, they said, there was sufficient to ground the hearsay evidence on.

The counsel on the other side were not heard by the court, who made several observations during the argument, to which the counsel for the plaintiff adapted their answers. On granting the rule nisi,

Lord KENYON, C.J., said, he doubted very much if evidence of reputation could be adduced in support of any prescription, unless it affected the public interest in some way or other.

ASHHURST, J., in the course of the argument, said that if this had been laid as a custom, he conceived that general reputation would have been evidence; but in the case of a private prescription, he doubted it very much.

BULLER, J., observed that the practice had been different on different circuits. On the Oxford it has been the practice to reject, and on the Western circuit to receive, this sort of evidence. But upon the latter, I have told the counsel, that I would indeed receive such evidence, if they pressed it, but that, in summing up, I should tell the jury that they were to decide upon the other parts of the case.

LORD KENYON, C.J. (after the argument).—The evidence given by the defendant of an usage of about seventy years is extremely strong in his favour; and the only evidence to weigh against it is that of the presentment signed by Robert Wood: but that is not necessarily inconsistent with it. The lord might have the general right, and yet a particular tenement have a prescriptive right also. On that ground, therefore, there is no pretence for impeaching the verdict. With respect to the other question raised respecting the rejection of general evidence of reputation; it is involved in great dispute; and one is apt to imbibe prejudices from the opinion one has always heard inculcated. Upon the Oxford circuit, which I went, such evidence was never received; and I cannot help thinking that that practice is best supported by principle. Evidence of reputation upon general points is receivable, because, all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs or private prescriptions? How is it possible for strangers to know anything of what concerns only these private titles? I barely, however, throw out these hints as the ground of my present opinion; laying in my claim to change that opinion if I should hear anything which shakes it.

ASHHURST, J., declared himself of the same opinion: adding, that the utmost which the evidence offered went to prove in the present case was that the lord had the general right; but that did not negative a particular right, provided it was made out in evidence, which it had been in the present instance.

BULLER, J.—I have already mentioned what has been the general practice on the Oxford and on the Western circuits; and as there are two judges from each of those circuits in court (1), it is hardly likely for us to agree upon the general point. But thus far I agree with my lord and my brother Ashhurst, that in no case ought evidence of reputation to be received, except a foundation be first laid by other evidence of the right. Now, here there was no foundation, or at least a very slight one, in comparison to the evidence given by the defendant. But I cannot agree that it ought not to be received at all. It was settled that it ought in the cases cited in argument, and also in many other instances which relate merely to private titles: in one in particular, as to whether such a piece of ground is parcel of one close or another. So again in the case of pedigrees. But as to this particular case, the evidence is very strong with the defendant. It was not proved that the estate in question was in possession of the defendant's grandfather at the time he signed the presentment which was read in evidence: and even if that were made out, all the evidence since for above sixty years is the other way. The defendant's ancestors have all that time taken stone in defiance of the presentment, and in the face of the lord himself, who was dared to bring any action for it. Now, supposing all the evidence of reputation had been received, I think it ought to have weighed so slightly with the jury, that the court ought not to grant a new trial. For I do not know that, because evidence which ought to have been received was rejected, therefore the court are bound to grant a new trial, if they see clearly that the verdict is right, notwithstanding such evidence had been admitted.

GROSE, J., was of the same opinion as Buller, J., on the general point, that

(1) Lord Kenyon and Ashhurst, J., had gone the Oxford, and Buller and Grose, JJ., the Western circuit.

evidence of reputation is to be admitted. I confess, he said, that habit has so enured my mind to think it admissible in these cases, that I cannot change my opinion without much further consideration; though I certainly should if, upon future thoughts, I should be convinced that the practice of the Western, and I believe also of the Northern circuit, is wrong. Once, indeed, I remember the case of a pedigree tried at Winchester, where there was a strong reputation throughout all the country one way, and a great number of persons were examined to it; but, after all, the whole was overturned, and proved to have no foundation whatever, by the production of a single paper from the Herald's Office, which shows, to be sure, how cautiously this sort of evidence ought to be admitted.

Rule discharged.

In *Outram v. Morewood*, Hil. 33 Geo. 3, 5 T. R. 123, Lord KENYON, C.J., said: "Although a general right may be proved by traditionary evidence, yet a particular fact cannot." The particular fact there was, whether a particular close, then called the Cow Close, had been part of the estate of Sir John Zouch in the 18th of Elizabeth, out of which certain rents and coals had been reserved; and all the court agreed, that this fact could not be proved by entries made by a third person, deceased, in his books of receipts of rents from his tenant; considering such entries as no more than a declaration of the fact made by such third person, which was different from the entries of a steward, who thereby charges himself with the receipt of the money. And Grose, J., distinguished this from the cases where traditionary evidence had been allowed, "because the tradition of a particular fact is not evidence."

In *Nicholls v. Parker*, Exeter summer assizes, 1805, upon a question of boundary between two parishes and manors, whether a certain common was within the parish and manor of Holme, of which Sir Bouchier Wrey, Bart., was lord, or within the parish of Buckfastleigh and manor of Mainbow, of which Colonel Parker was lord; Le Blanc, J., admitted evidence of what old persons, now dead, had said concerning the boundaries of the parishes and manors: though not as to particular facts or transactions. And this, though these old persons were parishioners, and claimed rights of common on the wastes, which would be enlarged by their several declarations; there not appearing to be any dispute at the time respecting the right of the old persons making the declarations, at least no litigation pending (for, in truth, the boundary had been long in dispute between the respective parishes and manors, and intersecting perambulations had been made both before and after such declarations by the respective parties); so that those persons could not be considered as having it in view to make evidence for themselves at the time. And in support of the same opinion were cited *The King v. The Inhabitants of Hammersmith*, sittings at Westminster after Hilary Term, 1776, before Lord Mansfield, C.J. (1), and a case of *Down v. Hole*, at Taunton, in 1795, before Lawrence, J., in both which the same point had been ruled.

In *Clothier v. Chapman*, Bridgwater summer assizes, 1805, where, in replevin, the question was whether Street Hill, alias Iveythorne Hill, a waste, was parcel of Iveythorne Farm, and the soil and freehold of one Rooke, or not; evidence was offered of declarations of old persons deceased, as to the ancient boundary of the waste belonging to Iveythorne Farm, that it extended

(1) See Peake's Evid. (Appendix, 33); and see another case of *Ireland v. Powell*, Salop spring assizes, 1802, *cor.* Chambre, J., Id. 13.

to the inclosures on the north side of the hill ; and 2 Roll. Abr. 186, pl. 5, tit. Prerogative, was cited in support of it, where it was held that such declarations, as to whether certain land was parcel of a manor or of an estate, were deemed admissible as between subjects, but not as against the crown ; and *Davies v. Pierce*, 2 T. R. 53, was also cited. But Graham, B., rejected the evidence in this case, where the question was not as to the boundary of a parish or manor, but between one person's private property and another. There was a verdict afterwards for the defendant, by whom this evidence had been offered, so that the question could not be stirred again.

Admission of
hearsay
evidence
exceptional.

THE admission of hearsay evidence in certain cases is an exception to the general law of England, which 'requires that witnesses should depose to facts within their own knowledge, and not to those which they have only heard stated by others. The reasons upon which the exception has been established vary somewhat in the different classes of cases to which it has been applied, but in those cases where matters of a public and general interest are in dispute, such evidence under the name of general reputation is admitted, upon the ground that the rights in question are usually of a very ancient date, with the consequent difficulty of obtaining direct testimony as to their existence, and also that a general reputation upon a matter in which many are interested is likely to be true.

Admissible in
disputes as to
matters of
public
interest.

Accordingly, evidence of reputation is admissible upon all disputes arising as to matters of public or general interest, such as rights and obligations depending upon custom ; *Doe v. Sisson*, 12 East, 62 ; *Crease v. Barrett*, 1 C. M. & R. 919 ; *Davies v. Morgan*, 1 Cr. & J. 587 ; *Laybourn v. Crisp*, 4 M. & W. 320 ; *Damerell v. Protheroe*, 10 Q. B. 20 ; *Berry v. Banner*, 1 Peake, 156 ; questions of boundaries of counties, parishes, manors, and other public districts ; *Nicholls v. Parker*, ante, p. 349 ; *Thomas v. Jenkins*, 6 A. & E. 525 ; *Evans v. Rees*, 10 Id. 151 ; *Barnes v. Mawson*, 1 M. & S. 77 ; *Wenman v. Mackenzie*, 5 E. & B. 447 ; *Smith v. Brownlow*, 9 Eq. 241 ; *Bidder v. Bridges*, 34 W. R. 514 ; *New Romney v. New Romney*, (1892) 1 Q. B. 840 ; the existence of, and liability to repair, public highways ; *R. v. Bliss*, 7 A. & E. 550 ; *Reed v. Jackson*, 1 East, 355 ; *R. v. Sutton*, 8 A. & E. 516 ; *R. v. Berger*, (1894) 1 Q. B. 823 ; the right to tolls thereon ; *Brett v. Beales*, Moo. & M. 416, 418 ; and so upon questions as to other rights of a similar character, and either to prove or disprove them ; *Drinkwater v. Porter*,

7 C. & P. 181; *Anglesey v. Hatherton*, 10 M. & W. 218; *Devonshire v. Neill*, 2 L. R. Ir. 132. "Where it is important to ascertain ancient facts of a public nature, the law does permit historical works to be referred to;" *Read v. Lincoln*, (1892) A. C. 644, 653.

It was at one time supposed that such evidence was only admissible where a foundation was laid for its reception by other proof of a more direct character, such as acts of user (*per Buller and Grose, JJ., Morewood v. Wood, ante*, p. 348; *per Le Blanc and Dampier, JJ., Weeks v. Sparke*, 1 M. & S. 688); but it is now settled that the absence of such proof affects only the weight, and not the admissibility, of evidence of reputation; *Crease v. Barrett*, 1 C. M. & R. 930; *Dunraven v. Llewellyn*, 15 Q. B. 804.

Absence of direct proof affects only weight of evidence of reputation.

A declaration to be evidence of reputation should have been made *ante litem motam*; *Richards v. Bassett*, 10 B. & C. 657; *Slaney v. Wade*, 1 Myl. & Cr. 338; but to exclude the evidence, the *lis mota* must have been upon the very same point; *Freeman v. Phillips*, 4 M. & S. 486. By the law of England, differing in this respect from the civil law, a *suit* is not necessary to constitute a *lis*; a controversy in a family, capable of being litigated, and in which the parties interested have taken opposite sides, constitutes a sufficient *lis* to render inadmissible in evidence a letter written on the subject by one of the members of the family, and addressed to another member of it; see *Butler v. Mountgarret*, 7 H. L. C. 633; and *Devonshire v. Neill*, 2 L. R. Ir., 132, 156, 8 App. Cas. 135.

Declaration must have been made *ante litem motam*.

Lis mota.

Although, as has been seen, evidence of reputation is admissible upon questions where a portion of the public are interested as well as upon those in which the public at large are concerned, yet this distinction is said to exist, that, whereas in the latter case the declarations of all deceased persons are admitted, the extent of their knowledge and opportunities going merely to the weight of their evidence, the reputation in the former case must be derived from persons who had from residence or otherwise the means of knowledge as to the reputation to which their declarations applied; see *Crease v. Barrett*, 1 C. M. & R. 928; *Dunraven v. Llewellyn*, 15 Q. B. 806; *Rogers v. Wood*, 2 B. & Ad. 245; 1 Taylor on Evidence, 8th ed., 538; and as to the effect of old maps, see *Pipe v. Fulcher*, 1 E. & E. 111; *Bidder v. Bridges*, 34 W. R. 514; *R. v. Berger*, (1894) 1 Q. B. 823; *New Romney v. New Romney*, (1892) 1 Q. B.

Distinction where portion only, and where public at large interested.

Old maps.

840. The practical importance of such a distinction, however, is not very great, inasmuch as evidence of reputation derived from a deceased person having no means of knowledge, if admissible, would manifestly be of no weight whatever.

Evidence not admissible on questions of private right.

Whilst the admissibility of evidence of reputation upon questions of public or general interest has thus been clearly established, it is now equally well settled, notwithstanding the doubts expressed by Buller and Grose, JJ., in *Morewood v. Wood*, *supra*, that such evidence is not admissible upon questions of mere private rights, or to prove particular facts; see the principal case and the cases in the notes to it, and *Dunraven v. Llewellyn*, 15 Q. B. 791; but if the question at issue, although upon a private right, yet involve within it the rights of the public, there evidence of reputation would be receivable as upon a matter of public interest; thus in *Carnarvon v. Villebois*, 13 M. & W. 313, such evidence was held admissible against a copyholder upon a claim by the plaintiff to a right of free warren co-extensive with the whole manor in which all the tenants had an interest; see also *Drinkwater v. Porter*, 7 C. & P. 181, and *Devonshire v. Neill*, 2 L. R. Ir. 132, 153, 8 App. Cas. 135.

On question of liability to repair highway, *ratione tenuræ*.

Reg. v. Inhabitants of Bedfordshire.

Upon the question of liability to repair a highway, *ratione tenuræ*, some difference of opinion seems to have existed as to admitting evidence of reputation. In *R. v. Wavertree*, 2 M. & Rob. 353, Maule, J., rejected the evidence upon the ground that the question was one of private right only, and Patteson, J., in *R. v. Antrobus*, 2 A. & E. 788, 794, intimated an opinion that such evidence would not be receivable; but in *R. v. Bedfordshire*, 4 E. & B. 535, the Q. B. decided the other way. That was a presentment against the inhabitants of the county of Bedford for not repairing a public bridge. Plea by two inhabitants for themselves and the rest of the inhabitants (excepting A., B., & C.), except as to three arches of the bridge, Not guilty, and as to those three arches, that A. ought to repair the first *ratione tenuræ*, B. the second, and C. the third. Upon issue joined on a traverse of the liability, Cresswell, J., refused to receive evidence of reputation; but upon motion for a new trial the court, in a considered judgment, in which the cases were reviewed, made the rule absolute, upon the ground that although the question at issue was one of the liability of the parties named to repair, it also involved that of the county at large, and was therefore of public and general interest. "If,"

said Lord Campbell, delivering judgment, "the question was whether a bridge be a public bridge which the public have a right to use, and the county is bound to repair, there seems to be no doubt that evidence of reputation would be admissible; and there seems no reason for following a different course where the question is, whether the county or an individual is bound to repair. Here the private liability of the individual comes in, but the question of the liability of the county remains."

Besides the exception as to the admissibility of hearsay to prove matters of public and general interest, there are several others founded either upon the probability of the correctness of such evidence in the particular case, or upon the necessity of resorting to it. For instance, the evidence of a witness examined as to the same matter in former judicial proceedings between the same parties; *Morgan v. Nicholl*, L. R. 2 C. P. 117; see *Printing, &c., Co. v. Drucker*, (1894) 2 Q. B. 801; the declarations of deceased members of a family as to the relationship of its members, in pedigree cases; *Shrewsbury Peerage Case*, 7 H. L. C. 1, 23; *Haines v. Guthrie*, 13 Q. B. D. 818; *Sturla v. Freccia*, 5 App. Cas. 623, 641; *Aylesford Peerage*, 11 App. Cas. 1; *Lyell v. Kennedy*, 14 App. Cas. 437; *Re Turner*, 29 Ch. D. 985; statements in ancient documents, coming from the proper custody, as to contemporaneous possession; *Smith v. Andrews*, (1891) 2 Ch. 678; statements of deceased persons against their interest, or in the ordinary course of their business; dying declarations of the cause of death, in cases of homicide. The subject is fully discussed in Best on Evidence, 8th ed., p. 438, and 1 Taylor on Evidence, 9th ed., p. 392, and see the above classes enumerated by Jessel, M.R., in *Sugden v. St. Leonards*, 1 P. D. 154, 240, though his statement as to the principle upon which the evidence has been admitted is questioned by Lord Herschell in *Woodward v. Goulstone*, 11 App. Cas. 469, 479.

Reputation is also evidence to prove a man's character in society: and "here reputation is not so much a circumstance from which the character of the individual is to be presumed, as the very fact itself, proved by the direct evidence of witnesses who constitute part of that society:" Starkie on Evidence, 4th ed., 44. In *Sheen v. Bumpstead*, 1 H. & C. 358, which was an action for an alleged fraudulent representation as to the trustworthiness of W., a tradesman, the defendant called a witness, and asked him—Was

Other exceptions as to admission of hearsay.

As to character.

W. (at the time in question) *trustworthy to your belief?* This question was objected to, but it was held by a majority of the court to be admissible: Bramwell, B., dissenting on the ground that the evidence did not directly bear upon the issues in the action, but raised a collateral issue as to the *belief* of the witness. The question was, however, held, in the Exch. Cham., to which the case was carried (2 H. & C. 193), to be admissible, as well as a question which had been put to other witnesses in the case as to W.'s *general reputation* for trustworthiness as a tradesman.

It may be added that there is no evidence submitted to a jury which varies more in its character, or, unless scrupulously weighed, is more likely to mislead, than evidence of reputation.

PATERSON *v.* GANDASEQUI.

HILARY.—52 GEO. 3, B. R.

[REPORTED 15 EAST, 62 (13 R. R. 368).]

If the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover the value against the known principal: but if the principal be not known at the time of the purchase made by the agent, it seems that, when discovered, the principal or the agent may be sued, at the election of the seller; unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing: as particularly in the case of principals residing abroad.

THIS was an action for goods sold, and upon the common money counts. At the trial before Lord Ellenborough, C.J., at the London Sittings after last Trinity Term, the following facts appeared. The defendant was a Spanish merchant, and a director of the Philippine Trading Company at Madrid, with which he was engaged in adventures to a large amount. In Jan., 1810, being then in London, he employed Larrazabal & Co., of London, merchants, to purchase for him various assortments of goods for the foreign market, for which they were to charge a commission of two per cent. Larrazabal & Co. accordingly applied to the plaintiffs, requesting them to send to their counting-house an assortment of silk hose, with their terms and prices. Paterson, jun., waited on them at the time and place appointed, with the patterns, terms, and prices; at which time the defendant was present at the counting-house, and the samples were handed over to him. He inspected them, and selected such articles as he required; and the terms and prices were also shown to him and left there. On 6th Jan. the plaintiffs received from Larrazabal & Co. an order in writing for 574 dozen of silk hose, to be ready in town on or before 20th Feb. next; the payment as agreed upon: signed, Larrazabal, Menoyo, and Trotiaga: and shortly after another order for 150 dozen more, with the like signature. Both these orders were given by Larrazabal & Co., for the use of and in execution of the orders received by them

from the defendant. The goods were sold by the plaintiffs on the credit of Larrazabal & Co., the invoices were made out in their names and sent to them, and Larrazabal debited the defendant with the amount. Soon after, and before the credit had expired, Larrazabal & Co. became insolvent; and thereupon the plaintiffs demanded payment of the defendant; which being refused, the present action was brought. Lord Ellenborough, being of opinion, upon these facts, that the plaintiffs had dealt with Larrazabal & Co. upon their sole and individual credit, knowing that the purchases they made were on account of the defendant, directed a nonsuit. In the following term it was moved to set aside the nonsuit, on the ground of assimilating this case of a dormant principal to that of a dormant partner, where, though the party furnishing goods to the ostensible partners intended at the time to give credit only to them, yet he may afterwards pursue his remedy against the dormant partner, when discovered. A rule *nisi* was granted.

The *Attorney-General*, *Marryat*, and *Littledale*, now showed cause against it, and observed upon the facts of the case, that the defendant, a foreigner, not wishing to pledge his credit in a British market, employed Larrazabal & Co. to make purchases for him on their own account, to whom he was to be answerable for the purchases so made. The plaintiffs dealt with Larrazabal & Co. as purchasers, and gave them credit for the goods, being aware at the time that they were purchased by Larrazabal & Co. on account of the defendant. If the defendant were to be held liable for the goods to these plaintiffs, he will have to pay twice for them; being clearly liable to Larrazabal & Co. [Lord ELLENBOROUGH: I have had instances perpetually before me, where the foreign trader, not choosing to make himself liable, has gone with his agent to the tradesman, and bought goods in the agent's name. I do not find any case which decides that where a person sells goods to an agent, with a knowledge of his principal at the time, and gives credit to the agent, he can recover against the principal.—*Garrow*, for the plaintiffs, observed that the whole of the argument on behalf of the plaintiffs was that the defendant was not known to the plaintiffs, at the time of the sale, to be the principal.] The facts show the contrary. The defendant, it appears, was present at the time, and pointed out to the

plaintiffs the different articles which he required, and selected them from the patterns. The only ground, therefore, for holding the defendant liable is that the goods ultimately came into his hands. But if this were enough, every foreign colonist who consigns his produce to his correspondent in this country, and receives in return from the merchant here a cargo purchased in the British market, would be liable to the various dealers of whom the articles composing such cargo were purchased. But it has never been attempted to charge the West India planter in these cases: the reason of which is that, as between him and the dealers, it is understood that the merchant here purchases on his own account. There is no custom to control that particular branch of trade, except what arises out of the understanding of the parties: where the dealings, therefore, are similar, the understanding must be the same. Here the defendant stands precisely in the same situation as the West India planter. He who employs another to purchase for him may indeed be liable, although the seller gave him no credit, if it shall turn out that he is the actual purchaser; but there is nothing in this transaction, or in the nature of Larrazabal's employment, to show that the defendant was the purchaser from the plaintiffs: on the contrary, the engagement between them was made with the express view of exempting him from all such liability, and the plaintiffs, by their mode of dealing, have shown that they so understood it, and cannot therefore now resort to him. [Lord ELLENBOROUGH: The case in which I remember that the liability of a principal was carried furthest was *Powel v. Nelson*, upon the Western circuit, of which Lawrence, J., had a MS. note. There, a factor made purchases for his principal, who made payments to him on account. Afterwards, the factor was pressed for payment by a letter, which came to the hands of the principal, who transmitted it to the factor, and, with a knowledge of the fact, paid him the residue. It was held by Lord Mansfield, that the principal was liable over to the sellers for the money he had so paid to his factor after notice. The *Attorney-General* said he believed that the case went further, and that the principal there was held liable to the whole amount of the purchases.—LE BLANC, J.: I should think not: the case can hardly be supported to that extent.] If the seller be at liberty to follow every person into whose hands the goods may have come, it will create endless confusion. A

broker may have purchased on account of several principals, and may have received from each of them payments on the general account, or may have made such payments to the seller : in these cases how could the seller apportion such payments, so as to charge each person with his proportional residue ? There are many instances where the principal is not liable, as in building contracts ; and yet the work done and materials found are for the principal only. [Lord ELLENBOROUGH mentioned a late case of *Bramah v. Lord Abingdon*, where the defendant had contracted with a surveyor, who ordered goods from the plaintiff for the use of the defendant's house ; and yet he was held not liable.] In the present case it appears further, that the plaintiff has made his election to charge Larrazabal & Co. by delivering the invoices to and debiting them with the price ; after which they cannot resort to the defendant. There may be a shifting liability from the broker to the principal, when the latter is disclosed ; but if once the election be made, that liability ceases ; for the plaintiffs cannot have two concurrent debtors.

Garrow, Park, and Richardson, contra. There is no circumstance in this case to show that the plaintiffs knew, at the time of the sale, that the defendant was the principal, except that of his happening to be at the counting-house when the goods were selected. So far from knowing him to be the principal, it does not appear that they knew him even by name. The circumstance of their making out the bills of parcels to Larrazabal & Co. carries the case no further : for that was done at a time when they were ignorant of the defendant's liability ; which is an answer also to the argument derived from the supposed election of the plaintiffs to resort to Larrazabal & Co. only ; it being impossible for them to have made any such election until they knew the parties between whom they might elect. It is therefore the common case of a broker who has made purchases for his principal without mentioning his name, in which the principal has always been held liable ; as in *Waring v. Favenck* (a), and *Kymer v. Suwercropp* (b). In *Railton v. Hodgson* (c), London sittings after T. T., 1804, and *Peele v. Hodgson* (c), at the sittings after Michaelmas Term, 1804, where the defendant bought goods of the plaintiffs in the name and

(a) 1 Camp. 85.

(b) Id. 109, see *post*, p. 389.

(c) These cases were mentioned on

moving for the rule ; they will be found *post* in *notâ*, p. 363.

upon the credit of Smith & Co., but those purchases were made in reality on his own account, he was held to be liable. Mansfield, C.J., said: Suppose a principal authorizes a factor to sell goods, and he sells them in his own name, the principal may call on the vendee for payment. Suppose the defendant had not been known to be the buyer, he would still have been liable: Smith & Co. would only have been nominal buyers. So in *Scrimshire v. Alderton* (d), even where a factor sold on a *del credere* commission, the vendee was held liable to the owner of the goods after notice given not to pay the factor. This is not like the case put of a foreign principal residing abroad; for the defendant was resident here, and establishing a house of trade. Neither can it be compared with that of a person engaging with a surveyor in a building contract; because there the persons employed under the surveyor have notice by the course of the trade that they are dealing with him only. Here, if the defendant had wished to exempt himself from the ordinary liability, he should have given notice to the sellers that they were to look to Larrazabal & Co. only. No confusion will arise from holding the defendant liable, because the goods here were bought wholly on his account, and not, as in the case supposed, on the account of several principals.

LORD ELLENBOROUGH, C.J.—The court have not the least doubt that, if it distinctly appeared that the defendant was the person for whose use and on whose account the goods were bought, and that the plaintiffs knew that fact at the time of the sale, there would not be the least pretence for charging the defendant in this action. But the doubt is, whether that does sufficiently appear by the evidence. It appears that the defendant was present at the counting-house of Larrazabal, where one of the plaintiffs had come by appointment, and in his presence inspected and selected such of the articles as he required; and the goods were afterwards ordered by Larrazabal & Co., credit given to them, and the invoices made out in their name, and sent to them. The question is, Whether all this was done with a knowledge of the defendant being the principal? The law has been settled by a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him; but that must be taken with some qualification, and a party may

(d) 2 Stra. 1182.

(Lord ELLENBOROUGH, C.J.)

preclude himself from recovering over against the principal by knowingly making the agent his debtor. It certainly appeared to me at the trial that the plaintiffs knew of the defendant being the principal, and had elected to take Larrazabal & Co. as their debtors, or I should not have nonsuited the plaintiffs; but as there may perhaps be a doubt upon the evidence whether the plaintiffs had a perfect knowledge of that fact, it may be as well to have it reconsidered.

GROSE, J.—I think that the plaintiffs in this case might have elected whom they would have for their debtor: and here they seem to have made that election. That, however, is the only doubt which is fit to be considered.

LE BLANC, J.—It will be material to have the facts inquired into more fully, in order to ascertain whether the tradesmen sold to the agents with a knowledge of the party for whom they were buying; or whether, without such knowledge, they chose to give credit to the agents, whether buying for another or for themselves. Many of the cases may, perhaps, be found distinguishable from this by their not falling precisely within the doctrine applicable to principal and broker; and it may be necessary to consider, in the present case, whether any distinction can be made between a home and a foreign principal.

BAYLEY, J.—There may be a particular course of dealing with respect to trade in favour of a foreign principal that he shall not be liable in cases where a home principal would be liable: that would be a question for the jury. I have generally understood that the seller may look to the principal when he discovers him, unless he has abandoned his right to resort to him. I agree that where the seller knows the principal at the time, and yet elects to give credit to the agent, he must be taken to have abandoned such right, and cannot, therefore, afterwards charge the principal. I think it should be reconsidered in this case whether the plaintiffs did so.

Rule absolute.

The two cases of *Addison v. Gandasequi* and *Thomson v. Davenport* are so nearly connected with that of *Paterson v. Gandasequi*, that it has been thought better to lay them before the reader as a supplement to it, than to attempt any abridgment of them in the note which follows.

ADDISON *v.* GANDASEQUI.

TRINITY.—52 GEO. 3, in C. P.

[REPORTED 4 TAUNT. 574 (13 R. R. 689).]

A., a merchant, purchases goods of B., for the use of C., who is present, and selects the goods, and stipulates with B. the price and other terms of the purchase. A. credits B. with the amount, and debits C. with the amount and a commission. B. debits A. in his books and invoices. B. cannot recover the price of the goods against C.

THIS was an action for goods sold and delivered, and was tried before Mansfield, C.J., and a special jury, at the sittings at Guildhall, after Michaelmas Term, 1811, when it appeared that the defendant was a member of a Spanish trading corporation, called the Philippine Company, and was a director of that company, and had come over to England to select a large assortment of goods destined for Lima. Larrazabal, Menojo, and Trotiaga, a house established in London, assisted him in providing the goods, and they having applied to the plaintiff, with whom they had previous dealings for twenty years, the plaintiff went by appointment to the house of Larrazabal & Co., in the City, with patterns of goods: he found the defendant there, who examined various patterns, cheapened the prices, mentioned the market for which they were intended, told the plaintiff he should charge a long price, and he, the defendant, would himself receive the bounty on exportation, and stipulated for fifteen months' credit; he took the goods home to his house in Clarges-street, and kept them a week to examine, and a clerk from the plaintiff's house frequently attended on him there to show and explain the patterns. The plaintiff received a written order from Larrazabal & Co., for a quantity of these goods; after which the defendant required of the plaintiff an abatement of 6*l.* per cent. on the prices of them, which the plaintiff refused to make, and the parties were about to terminate the treaty; but at length the defendant agreed to give the whole price required, and told the

plaintiff he might proceed to execute the order. The plaintiff and his clerks repeatedly had other meetings with the defendant, and several other parcels of goods were ordered by Larrazabal & Co., which had been selected by the defendant at those meetings. Larrazabal & Co. referred the plaintiff to the defendant for instructions as to the mode in which the goods were to be packed for exportation, and the defendant gave those instructions. The invoices were all made out by the plaintiff to Larrazabal & Co., and they were debited in the plaintiff's books for the amount of the long price. Larrazabal & Co., in their books, debited the defendant with the amount of the invoices, and also with a commission for purchasing them, of 2l. per cent. on the amount, which was their ordinary mode of dealing with the defendant, and they credited the plaintiff with the amount of the invoices. Upon an occasion subsequent to these sales, Larrazabal & Co. having applied to purchase some goods of the plaintiff, the plaintiff said he thought he had for that time extended his credit far enough to Larrazabal & Co., and declined furnishing the goods. Larrazabal & Co. gave the orders for packing and shipping the goods, and in their own names; but in pursuance of instructions given by the defendant, chartered a vessel to Lima, in which these goods were conveyed, and instructed the master not to part with the return cargo until payment of the freight and amount of Larrazabal's demand on the defendant. The master did not deliver the return cargo but, in consequence of instructions from Larrazabal & Co., after a sum of 72,000l. had been deposited by the defendant for their security. One of the partners in their house, which had become bankrupt, being examined, stated that the house purchased these goods of the plaintiff on their own credit and account, as they would any other goods for which they had occasion in their trade, and Larrazabal & Co. had insured the goods in their own names, for which they had a further commission of a half per cent. The plaintiff contended that though the credit was given to Larrazabal & Co., yet that as the defendant had the goods, he was liable to pay for them; and that this was only the common case of a broker buying for his principal; the principal, when disclosed, is liable. MANSFIELD, C.J., left it to the jury whether Larrazabal did act as broker or not, and observed that, as the defendant saw and handled the patterns, and

was seen in the business, if he had been the purchaser, most probably the credit would have been immediately given to him ; the jury, under these circumstances, being of opinion that the goods were sold to Larrazabal, as principal, found a verdict for the defendant.

Best, Serjt., for the plaintiff, in pursuance of liberty reserved at the trial, obtained, in last Hilary Term, a rule *nisi* to enter a verdict for the plaintiff : he cited the cases *Railton v. Hodgson* and *Peele v. Hodgson* (a).

Shepherd, Serjt., in Easter Term last, shewed cause against the rule, contending, in the first place, that the rule could not be made absolute in the shape in which it was moved ; for though the court should think the defendant was not entitled to the

(a) *Railton v. Hodgson* and *Peele v. Hodgson*.—These cases are not reported, but, by the brief and notes of the counsel for one of the parties, they appeared to be to the following effect. The former was tried at the sittings after T. T., 1804, and the latter at the sittings after M. T., 1804, before Mansfield, C.J. The facts were, that the defendant, Hodgson, had formerly been a clerk with Smith, Lindsay, & Co., and afterwards set up in business for himself, and had a counting-house for himself at the house of Smith, Lindsay, & Co., which the vendors knew ; that he purchased goods himself, and directed the vendors to draw bills upon Smith, Lindsay, & Co., and make out invoices to that house, which was then a house of good credit, and without whose security Hodgson could not have obtained credit and made the purchases. Smith, Lindsay, & Co. received from the defendant a commission of from two and a half to five per cent. upon the goods. The vendors entered the goods in their own books, in the names of Smith, Lindsay, & Co. ; made out the invoices in the name of, and sent them to, Smith, Lindsay, & Co. ; and drew bills upon them for the amount, which Smith, Lindsay, & Co. accepted ; the defendant insisted that he purchased as the agent of Smith, Lindsay, & Co., and in their names, and on their account, as he used to do when in their employ. There was proof, however, of his being the principal, and having bought the goods on his own

account. The plaintiffs obtained a verdict, and Mansfield, C.J., in summing up the evidence, observed to the jury, “that it was admitted these goods were never delivered to Smith, Lindsay, & Co. ; the defendant had the goods, and the profits and loss ; Smith, Lindsay, & Co. were only to have a commission, for which they lent their credit. Suppose a principal authorises a factor to sell goods, and he sells in his own name, the principal may call upon the vendee for payment. It appeared that Hodgson had been a trader from 1798. Suppose Hodgson had not been known to be the buyer, he would have been liable ; Smith, Lindsay, & Co. would only have been nominal buyers. If Hodgson had really paid Smith, Lindsay, & Co., it would have depended upon circumstances whether he would be liable to pay for the goods over again ; if it would have been unfair to have made him liable, he would not have been so. What pretence was there that the plaintiffs should be thrown upon the insolvent estate of Smith, Lindsay, & Co., who never had the goods ? This was a stronger case than that of a dormant partner. The buyer must be liable, though a third person may also, unless there is an express agreement that the buyer shall not be liable.” The jury found a verdict for the plaintiffs. A motion was made in the following term to set aside the verdict, and have a new trial ; but the court refused it.

verdict, it was not clear the plaintiff was; and the rule, if any, should be for a new trial. He further contended that the effect of the evidence was, that Larrazabal was not the agent of the defendant in the affairs, but was in fact the principal to whom the credit was given, for that otherwise the defendant could never have obtained the goods; for no one would have given credit to a person unknown, and from whom creditors would have no means of compelling payment but by arrest. And he relied on the fact that the plaintiff, being applied to for some other goods, did not refuse to give the defendant any further credit, but said they would give Larrazabal no further credit.

Best and *Vaughan*, Serjts., in support of the rule, contended that, as there was no fact in dispute in the case, the plaintiff was entitled to have the rule to enter a verdict for him. They insisted that in this case Larrazabal was the mere agent of the defendant, which was indicated by his receiving commission. But the plaintiff in fact had the security of both parties: for under the written order, which did not affect the real buyer, Larrazabal & Co. were liable; and the defendant was liable, because he had the goods, which raised a sufficient contract; for, by the law of England, he who has the goods shall be obliged to pay for them. It had been admitted that, when a broker contracts for a principal unknown, when such principal is discovered he may be sued; and so if one partner only contracts, the others, when discovered, are liable. They cited *Railton v. Hodgson*, *Peele v. Hodgson*, and *Powel v. Nelson*, cited by Lord Ellenborough, C.J., in *Paterson v. Gandasequi*, 15 East, 65; *Waring v. Favenck*, 1 Camp. 85, and *Kymer v. Suwercropp*, Id. 109. The principal could only be discharged by payment, and that payment must be to the vendor, if he is known; if unknown, the vendee must pay the agent, but unless he pays one or the other he is liable; *Wyatt v. Marquis of Hertford*, 3 East, 147.

Shepherd, in reply on the cases, contended that the authorities of *Wyatt v. Marquis of Hertford* and *Powel v. Nelson* did not apply: the last was a question of fraudulent payment to the factor by the principal, after knowledge of the factor's not having paid, and notice to pay to the vendor, which Lord Ellenborough held to be a payment in his own wrong, for he had no right to pay the factor till he saw the seller paid. The cases of *Railton v. Hodgson*

and *Peele v. Hodgson* are more like this, but are an *ex parte* account of the cause ; and as the rule *nisi* was not granted, the subject was not discussed, and therefore the cases were of less authority.

The Court took time to consider, and

MANSFIELD, C.J., now gave the judgment of the Court. This is a motion made for a new trial, the verdict having been given for the defendant. The circumstances of the case are very singular. The motion is made on the ground that though the actual vendees of the goods were Larrazabal & Co., yet that the verdict ought to have gone against the defendant, as the person for whom the goods were bought by Larrazabal & Co. I left it to the jury to consider whether Larrazabal & Co. were acting as factors for the defendant, or whether the goods were bought by the defendant himself, who was acting for the Philippine Co. In certain cases it would undoubtedly be a monstrous thing to charge the defendant, but in this case there would be no such hardship, because the defendant had received the money of the Philippine Co. The order was given by the house of Larrazabal & Co., and the invoice was made out to them ; and the goods were put on board the ship called the Archduke Charles, chartered by Larrazabal & Co., under bills of lading which compelled the captain to deliver the goods to their order ; so that throughout the transaction, from the beginning to the end, the goods are treated as purchased by Larrazabal & Co. It was proved that the defendant was at the counting-house of Larrazabal & Co., and was shown a variety of goods. The defendant objected to the price of the goods, and there was a treaty respecting the terms of payment for them : what had passed between Larrazabal, jun., and the plaintiff, did not appear at the trial ; but it was given in evidence that the former had met the plaintiff, before the plaintiff saw the defendant at the counting-house of Larrazabal & Co. Directions were given by the defendant how the goods were to be packed ; so it was very clear, from all these transactions, that these goods were intended for the defendant, not individually (although he was a partner in the adventure), but for the use of this company. Moore, the captain of the ship, went to Lima with the goods, and accounted with the defendant for the proceeds of the cargo, but not till after he had

(MANSFIELD, C.J.)

written to Larrazabal & Co., and received orders for him so to do. The orders to the shipper, to the packer, and broker, were read; all of which were made out in the name of Larrazabal & Co. A witness, Trotiaga, from Larrazabal's house, proved that he bought these goods for his own house, exactly as he would buy any other goods; that he had been four years partner; he was in the house of the plaintiff when an order for further goods was proposed, and the plaintiff said that he could not give Larrazabal & Co. any further credit. Larrazabal & Co. gave credit to the plaintiff in their books for the amount of these goods, and debited the defendant; 70,000*l.* had been paid as a deposit, and was now in the bank, to abide the event of this cause, which I did not understand. I left it to the jury to say *whether this were the common case of a merchant here buying for his correspondent abroad, on which he charged a commission, or whether it was the case of a factor buying goods for his principal*; and they found for the defendant. None of the cases that have been cited at all resemble this case; for although it was not said expressly that the plaintiff did not look to the defendant, yet, upon all the circumstances of the transaction, it evidently appears that he did not. And, if a man selling to another for the use of a third, who stands by and is known, may make the contract with the buyer, without making the third person responsible, certainly this is that case. The cases cited, of *Railton v. Hodgson* and *Peele v. Hodgson*, are very different from this: the partner in the house of Lindsay & Co. gave an account certainly of a very strange manner of carrying on the trade, but still he made it the trade of Hodgson: and there could be no doubt in those cases of the liability of the defendant. Now in this case, if it had been intended that the sale should be to the defendant, and that Larrazabal & Co. were to be only sureties, the plaintiff would certainly have debited the defendant, and taken a guarantee from Larrazabal & Co. And only see what a state the defendant would be in, buying, as he does, such an immense amount of goods of the plaintiff and other persons! And although it has been objected by the counsel that it is a hard case, that this money, getting into the hands of Larrazabal & Co., should not find its way wholly to the plaintiff, of whom the goods were purchased, yet we cannot alter

the law of the case or the nature of the contract on account of any subsequent events. The insolvency of Larrazabal & Co. may make an unfortunate difference in the case, as to the consequences, but it will not alter their liability. We, who are called on to set aside this verdict, must, in order thereto, say on this evidence, that Larrazabal only was not to be the debtor, but that the defendant also, who was to buy these goods for the Philippine Company, was to be liable ; but we can find no evidence to warrant us in that conclusion : the rule therefore must be

Discharged.

THOMSON *v.* DAVENPORT.

HILARY.—9 & 10 *GEO.* 4, *in K. B.*

[REPORTED 9 B. & C. 78.]

At the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, and the seller did not inquire who they were, but afterwards debited the party who purchased the goods: Held, that the seller might afterwards sue the principals for the price.

THIS was a writ of error brought upon a judgment obtained in the borough court of Liverpool against the plaintiff in error. The plaintiffs below declared for goods sold and delivered. Plea, general issue. Upon the trial before the mayor and bailiffs, assisted by the recorder, a bill of exceptions was tendered to the direction given by the mayor, bailiffs, &c., by the said recorder to the jury. The bill of exceptions stated that one Thos. M'Kune was produced and examined upon oath as a witness by the counsel for the plaintiffs, to maintain the issue on their parts. And M'Kune stated in evidence, that he, M'Kune, was established in Liverpool as a general Scotch agent, and, amongst others, acted as agent for the defendant, who resided in Dumfries; that in March, 1823, he received from the defendant a letter, containing an order to purchase various goods, and, amongst others, a quantity of glass and earthenware; which letter, with the order, was produced by the plaintiff's attorney, and was read in evidence as follows:—"Dumfries, 29th March, 1823. Annexed is a list of goods which you will procure, and ship per Nancy. Memorandum of goods to be shipped: twelve crates of Staffordshire ware, crown window glass, ten square boxes," &c., &c. That he, M'Kune, provided himself with the goods mentioned in this letter, and that he got the glass and earthenware from the plaintiffs, who were glass and earthenware dealers in Liverpool: that, at the time he ordered the glass and earthenware, he saw the

plaintiff, Mountford Fynney, himself, and, to the best of his recollection, told him that he, M'Kune, had an order to purchase some goods, and that they were for the same house for whom he had purchased goods from the plaintiffs the preceding year; and he also stated, to the best of his recollection, that "as he was a stranger to the nature of the goods, he hoped that the plaintiffs would let him have the same as before, to save him from blame by his employer;" but he, M'Kune, did not show the *plaintiffs the letter containing the order, nor did he mention the name of any principal*; that he then either gave the plaintiff, Mountford Fynney, a copy of the order, or produced to him the original order, that Fynney might himself take a copy, but he rather thought that the former was the fact, and that the plaintiff Fynney did not see the original, though he could not say positively; that the plaintiff accordingly furnished the glass and earthenware, the amount of which, deducting the discount, was 193*l.* 7*s.* 8*d.*, but, adding the discount, 219*l.* 10*s.*, and rendered invoices thereof to M'Kune, headed thus: "Mr. Thos. M'Kune bought of John and James Davenport" (which was the plaintiffs' firm); that M'Kune entered the net amount (193*l.* 7*s.* 8*d.*) to the credit of the plaintiffs, in an account with them in his books, and charged the same sum, with the addition of 2 per cent. for the commission, to the debit of the defendant in an account with him, which was according to his invariable course of dealing; and that he sent to the defendant a general invoice of all the goods purchased, comprising the glass and earthenware, but not mentioning the plaintiffs' names; that afterwards, in April, 1823, and before the credit of the goods had expired, M'Kune became insolvent, though up to the day of his stopping payment he was in good credit, and could have bought goods on trust to the amount of 20,000*l.* Whereupon the said mayor and bailiffs, by the said recorder, after stating the evidence, told the jury that, from the distance of time since the sale took place, there was some uncertainty in the evidence of M'Kune as to the precise words used by him to the plaintiffs at the time he gave them the order for the goods: but it appeared to them (the said recorder) upon the evidence, that the name of the defendant as principal was not then communicated or known to the plaintiffs; and directed the jury that, if they were of opinion that the defendant's name as

principal was mentioned by M'Kune to the plaintiffs at the time the order was given, or that the plaintiffs then knew that the defendant was the principal, their verdict ought to be for the defendant: but if they were of opinion that the defendant's name as the principal was not mentioned by M'Kune to the plaintiffs at the time of the order being given, and that the plaintiffs did not then know that the defendant was the principal, and they did not think upon all the said facts of the case that the plaintiffs, at the time of the order being given, knew who the principal was, so that they then had a power of electing whether they would debit the defendant or M'Kune, they ought to find a verdict for the plaintiffs; and that, although the plaintiffs at the time of the sale might think that M'Kune was not buying the goods upon his own account, yet if his principal was not communicated or made known to them, that circumstance ought to make no difference in the case. The jury, after finding as a fact that the letter containing the order was not shown and made known to the plaintiffs, gave their verdict for the plaintiffs below for 219*l.* 10*s.* It was contended that the mayor and bailiffs, by the recorder, ought to have directed the jury that if they were satisfied that Davenport, &c., at the time of the order being given, knew that M'Kune was buying the goods as an agent, even though his principal was not communicated or made known to them, they by afterwards debiting M'Kune, and so rendering the said invoices, had elected to take him for their debtor, and had precluded themselves from calling on Thomson.

Joy, for the plaintiff in error.—Davenport & Co., the sellers of these goods, knowing that M'Kune was an agent, and electing to take him as their debtor, cannot now resort to Thomson. The two following propositions will not be disputed. Where the seller of goods, knowing that the buyer, though dealing in his own name, is in truth the agent of another, elects to give the credit to such buyer, he cannot afterwards recover their value from the principal. On the other hand, if the seller be ignorant at the time of the sale that the purchaser is buying for another person, that person may be sued, unless where the seller may have abandoned his right to resort to him. Of these two propositions, the first is absolute; the second conditional. It will be contended that this is an intermediate case, and altogether new.

But it clearly falls within the first of the above propositions; or if it can be said to range between them at all, it is not equidistant, but approximates to the first more clearly than to the second. Or, thirdly, if it were practicable to force it nearer to the second, this case would clearly fall within the condition. Here the sellers were distinctly informed that the buyer was in truth the agent of another, and yet they elected to give credit to such agent. They have, therefore, thus precluded themselves from recovering over against the principal. They chose to treat the agent as their debtor, with the full knowledge that the goods were for another. They were so satisfied to have the agent for their debtor, that they did not even ask the name of his principal. It was natural they should prefer him to a house at Dumfries, the members of which resided out of the reach of the laws of England. It will be said that they could not elect to take him as their debtor, because the name of the principal was not mentioned. But that was the fault of the sellers: they did not ask the name. They were told the goods were for a house at Dumfries. There was no attempt at concealment on the part of the buyer. If they had not fully decided, at the time of making the contract, to prefer M'Kune to any house in Dumfries, they would surely have inquired for *what* house he was acting. This omission made their preference of him manifest. They knew not only that M'Kune was buying for another, but they knew also the description of that other, *viz.*, a house in Dumfries. Beyond this, what was there in the name? Or, if anything worth their knowing, their ignorance of it was solely imputable to their own *laches*. *Caveat venditor*. If they wilfully closed their eyes against further light *then*, they cannot *now* complain that it was imperfect. But they had abundant information whereon to exercise an election, and by their conduct they have shown that they preferred to take M'Kune as their debtor. The name of the principal is wholly immaterial, if the sellers, knowing that there is a principal, elect to take the agent as their debtor. If this case, therefore, come nearer to the second proposition, the sellers must be held to have abandoned their right to resort to the principal. The doctrine is fully established by *Paterson v. Gandasequi* (a), and *Addison v. Gandasequi* (b); and partially confirmed by *Maanss v.*

(a) 15 East, 62, *ante*, p. 355.(b) 4 Taunt. 574, *ante*, p. 361.

Henderson (c), where it was held to be a sufficient intimation of the agent's character, that he, in time of war, described a ship as neutral. It is consonant to the general principle of the law merchant, as evinced by its admission in the case of foreign principals. And as, in respect to the difference of courts and the difficulties of executing process, a Scotchman domiciled in Dumfries stands much in the same position as a foreigner, the same rule should hold as to both. In point of law, therefore, this doctrine is consistent with the decisions in analogous cases; in point of commercial policy, it is expedient; and, in point of equity between these parties, it is just.

Patteson, *contra*. — It is undoubtedly established by the authorities that, if the seller knows that there is a principal, and also who that principal is, and afterwards gives credit to the agent, he thereby makes his election, and abandons his right to resort to the principal. But in this case the seller did not, either at the time of the sale or at the time when he gave credit to the agent, know the name of the principal; he had not, therefore, the power of making an election. This case, therefore, does not fall within the cases cited. On the other hand, it is clearly established that, if the seller does not, at the time of the sale, know that the buyer is an agent, he may, when he discovers the fact, sue the principal, although in the meantime he has given credit to the agent. The present is an intermediate case, for here the seller knew at the time of the sale that the buyer was an agent, but did not know for whom he was agent. The seller was not bound to inquire the name of the principal; and therefore this case belongs to the latter rather than the former class. The seller cannot make his election between the agent and principal until he knows who the principal is: for the election implies a comparison of their individual credit. The right to resort to the principal could be determined only by reason of the seller having exercised an election, and that right was not put an end to in this case, because no election was or could be exercised. Neither is the buyer injured by the seller suing the principal; the credit had not expired when the action had commenced, nor had the buyer settled any account with his principal. The buyer therefore is not in a worse situation than he was before. *Wilson v.*

Hart (d) and *Seymour v. Pychlau* (e) show that the rule as to discharging the principal is not to be extended. As to the argument from inconvenience, if an unknown principal is not to be liable when discovered, great inconvenience will follow. The majority of contracts are made by agents who are known to be agents, but the names of their principals are not known. In *Moore v. Clementson* (f) it was held that although a factor sells goods as a principal, yet if, before they are all delivered and before any part of them is paid for, the purchaser is informed that they belong to a third person, in an action by the latter for the price of them the purchaser cannot set-off a debt due to him from the factor. Lord Ellenborough there says: "A man who is in the habit of selling the goods of others may likewise sell goods of his own: and where he sells goods as a principal, with the sanction of the real owner, the purchaser who is thus led to give him credit, shall on no account afterwards be deprived of his set-off by the intervention of a third person. But here there was express notice to the purchaser, before the contract was completed, that Green in this particular transaction acted only as a factor." In *Railton v. Hodgson* (g) the sellers gave credit to Smith, Lindsay & Co; but it was held they might maintain an action against the defendant, who had had the goods. The defendant here has had the goods, and in justice ought to pay for them, unless the plaintiff has done anything to preclude himself from suing, or unless it be shown that by suing the defendants he is altering the rights of other parties, and neither of those things can be shown.

LORD TENTERDEN, Ch.J.—I am of opinion that the direction given by the learned recorder in this case was right, and that the verdict was also right. I take it to be a general rule that, if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this

(d) 7 Taunt. 295, *post*, p. 393.

(e) 1 B. & Ald. 14.

(f) 2 Camp. 22.

(g) Cited in *Paterson v. Gandasequi*, and reported *ante*, p. 363, *in notâ*.

(Lord TENTERDEN, C.J.)

qualification (*h*), that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to *Addison v. Gandasequi* (*i*) and *Paterson v. Gandasequi* (*k*), the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods, the plaintiffs were informed that M'Kune, who came to them to buy the goods, was dealing for another, that is, he was an agent, but they were not informed *who* the principal was. They had not, therefore, at that time the means of making their election. It is true that they might, perhaps, have obtained those means if they had made further inquiry. Not knowing who the principal really was they had not the power at that instant of making their election. That being so, it seems to me that this middle case falls in substance and effect within the first proposition which I have mentioned, the case of a person not known to be an agent; and not within the second, where the buyer is not merely known to be agent, but the name of his principal is also known. There may be another case, and that is where a British merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner. In this case, the buyers lived at Dumfries; and a question might have been raised for the consideration of the jury, whether, in consequence of their living at Dumfries, it may not have been understood among all persons at Liverpool, where there are great dealings with Scotch houses, that the plaintiffs had given credit to M'Kune only, and not to a person living, though not in a foreign country, yet in that part of the king's dominions which

(*h*) See, however, as to this qualification, *Irvine v. Watson*, 5 Q. B. D. 414, *post*, p. 391.

(*i*) 4 Taunt. 574, *ante*, p. 361.

(*k*) 15 East, 62, *ante*, p. 355.

rendered him not amenable to any process of our courts. But instead of directing the attention of the recorder to any matter of that nature, the point insisted upon by the learned counsel at the trial was, that it ought to have been part of the direction to the jury, that if they were satisfied the plaintiffs, at the time of the order being given, knew that M'Kune was buying goods for another, even though his principal might not be made known to them, they, by afterwards debiting M'Kune, had elected him for their debtor. The point made by the defendant's counsel therefore was, that if the plaintiffs knew that M'Kune was dealing with them as agent, although they did not know the name of the principal, they could not turn round on him. The recorder thought otherwise: he thought that though they did know that M'Kune was buying as an agent, yet, if they did not know who his principal really was, so as to be able to write him down as their debtor, the defendant was liable, and so he left the question to the jury, and I think he did right in so doing. The judgment must therefore be affirmed.

BAYLEY, J.—There may be a course of trade by which the seller will be confined to the agent who is buying, and not be at liberty at all to look to the principal. Generally speaking, that is the case where an agent here buys for a house abroad. There may also have been evidence of a course of trade applicable to an agent living here acting for a firm resident in Scotland. But that does not appear to have been made a point in this case, and it is not included in the objection which is now made to the charge of the recorder. In my opinion, the direction of the recorder was right; and it was, with the limits I have mentioned, perfectly consistent with the justice of the case. Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer

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to the action brought by the seller where he had looked to the responsibility of the agent (*l*). But the seller, who knows who the principal is, and instead of debiting that principal debits the agent, is considered, according to the authorities which have been referred to, as consenting to look to the agent only, and is thereby precluded from looking to the principal. But there are cases which establish this position, that, although he debits the agent who has contracted in such a way as to make himself personally liable, yet, unless the seller does something to exonerate the principal, and to say that he will look to the agent only, he is at liberty to look to the principal when that principal is discovered. In the present case the seller knew that there was a principal; but there is no authority to show that mere knowledge that there is a principal destroys the right of the seller to look to that principal as soon as he knows who that principal is, provided he did not know who he was at the time when the purchase was originally made. It is said that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the accounts between the principal and agent been such as to make it unjust that the former should be called upon to make the payment. But in a case circumstanced as this case is, where it does not appear but that the man who has had the goods has not paid for them, what is the justice of the case? That he should pay for them to the seller? Or to the insolvent agent, or to the estate of the insolvent agent, who has made no payment in respect of these goods? The justice of the case is, as it seems to me, all on one side, namely, that the seller shall be paid, and that the buyer (the principal) shall be the person to pay him, provided he has not paid anybody else. Now, upon the evidence it appears that the defendant had the goods, and has not paid for them, either to M'Kune, or to the present plaintiffs, or to anybody else. He will be liable to pay for them, either to the plaintiffs or to M'Kune's estate. The justice of the case, as it seems to me, is, that he should pay the plaintiffs, who were the sellers, and not any other persons. I am

(*l*) But see as to this, *Irvine v. Watson*, 5 Q. B. D. 414, *post*, p. 391.

therefore of opinion that the direction of the recorder was right.

LITTLEDALE, J.—The general principle of law is, that the seller shall have his remedy against the principal, rather than against any other person. Where goods are bought by an agent, who does not at the time disclose that he is acting as agent, the vendor, although he has debited the agent, may, upon discovering the principal, resort to him for payment. But if the principal be known to the seller at the time when he makes the contract, and he, with a full knowledge of the principal, chooses to debit the agent, he thereby makes his election, and cannot afterwards charge the principal. Or if in such case he debits the principal, he cannot afterwards charge the agent. There is a third case. The seller may, in his invoice and bill of parcels, mention both principal and agent: he may debit A. as a purchaser for goods bought through B., his agent. In that case, he thereby makes his election to charge the principal, and cannot afterwards resort to the agent. The general principle is, that the seller shall have his remedy against the principal, although he may, by electing to take the agent as his debtor, abandon his right against the principal. The present case differs from any of those which I have mentioned. Here the agent purchased the goods in his own name. The name of the principal was not then known to the seller, but it afterwards came to his knowledge. It seems to me to be more consistent with the general principle of law, that the seller shall have his remedy against the principal, rather than against any other person, to hold in this case that the seller, who knew that there was a principal, but did not know who that principal was, may resort to him as soon as he is discovered. Here the agent did not communicate to the seller sufficient information to enable him to debit any other individual. The seller was in the same situation as if at the time of the contract he had not known that there was any principal besides the person with whom he was dealing, and had afterwards discovered that the goods had been purchased on account of another; and, in that case, it is clear that he might have charged the principal. It is said that he ought to have ascertained, by inquiry of the agent, who the principal was; but I think that he was not bound to make such inquiry, and that by debiting the agent with the price of the

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goods, he had not precluded himself from resorting to the principal, whose name was not disclosed to him. It might have been made a question whether it was not a defence to this action that the principal resided in Scotland. But that was not a point made at the trial, nor noticed in the bill of exceptions; we cannot, therefore, take it into our consideration. For the reasons already given, I think the plaintiff is entitled to recover.

Judgment affirmed.

PARKE, J., having been concerned as counsel in the cause, gave no opinion.

THESE three cases are printed together and at length, since they are almost always cited at the same time, and, taken together, comprise most of the law on the point to which they relate, namely, *the liability of an unnamed principal when discovered*.

*Thomas v.
Edwards.*

Judgment of
Parke, B.

A very elaborate judgment upon a point nearly connected with this subject was delivered by Parke, B., in *Thomas v. Edwards*, 2 M. & W. 215. In that case, one Miller, by the direction of an election committee, of which the defendant was chairman, opened several public-houses, including that of the plaintiff's testatrix. The action was brought against the defendant for the meat and drink supplied. On a motion for a new trial, Parke, B., stated the following rules for the guidance of the sheriff, by whom the issue was to be tried. "The plaintiff must prove an express contract, or a contract implied between the defendant and his testatrix, to pay for the meat and drink supplied by her to the voters. The burden of proof is on the plaintiff. The first question will be, *Whether any contract at all was entered into with the plaintiff's testatrix?* If she supplied the meat and drink to the voters *on a mere speculation* that the candidate, or someone interested in the election, would *as a matter of honour* pay for them, no contract was thereby created with anyone. But if she supplied them by the order of another, *looking to be paid as a matter of right*, a contract would be implied. On the supposition that a contract *was* entered into, the next question is, *With whom that contract was made?* The voters were certainly not contracting parties. Miller, the person who gave the order, was *primâ facie* the contracting party with the plaintiff's testatrix. But if the plaintiff

shows that Miller was acting as the agent of another in giving that order, the principal is the person ordering in point of law, and is, therefore, the contracting party. If, then, it is proved that Miller was employed by the defendant alone, or by the defendant and others, to give the order, and that the defendant himself was not acting, in so employing Miller, as agent for anyone else, then the defendant is the principal, and is liable, *whether he intended or not to pledge his personal responsibility. He is responsible if he be a principal; and he is so, unless he himself be an agent for another.* The same consequence will follow if Miller was not a mere agent, but acted jointly with the defendant, or with the defendant and others, in giving the order. If it should appear that the testatrix considered Miller as acting on behalf of the candidate, and trusted him by supplying goods to the voters, on the supposition that he was authorised to contract on his behalf, it would make no difference, though the contract with the candidate would have been illegal; for, on proof by the plaintiff that Miller was not so authorised, the plaintiff would establish that the contract was *not* with the candidate, though the testatrix supposed it to be; and there would therefore be no illegality in the contract *actually made*, and no policy of the law would prevent an action being brought upon it. . . . In addition to the cases of *Peele v. Hodgson* and *Railton v. Hodgson* (*supra*, p. 363), cited in the argument as to the liability of *one who was the real principal, though he was believed to be agent for another*, I may mention the *dictum* of Lord Holt (Holt, 309), who says: 'If A. employs B. to work for C. without warrant from C., A. is liable to pay for it.' " See also *Longbottom v. Rodgers*, 2 M. & Gr. 427.

The following cases as to the liability of provisional committeemen in railway schemes, which are in fact decisions on the law of agency, should also be referred to: *Reynell v. Lewis*, and *Wyld v. Hopkins*, 15 M. & W. 517; *Barker v. Stead*, 3 C. B. 946; *Bailey v. Macaulay*, 13 Q. B. 815; *Williams v. Piggott*, 2 Exch. 201; *Norris v. Cottle*, 2 H. L. C. 647; *Hutton v. Upfill*, Id. 674; *Hutton v. Thompson*, 3 Id. 161; and *Bright v. Hutton*, Id. 341; see also *Re Empress Engineering Co.*, 16 Ch. D. 125.

Liability of provisional committeemen in railway schemes.

From the case of *Thomas v. Edwards*, added to those in the text, the following rules have been inferred—though it will be presently seen that they must be taken with some qualifications:—

Rules.

1. That where A. contracts with B., without stating himself to be an agent, B. may, on discovering his principal, *elect* between them; see *Franklyn v. Lamond*, 4 C. B. 637; *Peterson v. Ayre*, 13 Id. 353; and *Cooke v. Wilson*, 1 C. B. N. S. 153.

Election.

He cannot, however, sue the agent to judgment and afterwards bring a second action against the principal; *Priestly v. Fernie*, 3 H. & C. 977; see *Partington v. Hawthorne*, 52 J. P. 807, where, a judgment against the agent having been set aside, an action against the principal was held to lie; see also notes to *Duchess of Kingston's Case*, *post*. Whether there has been an election is generally a question of fact for the jury; *Calder v. Dobell*, L. R. 6 C. P. 486; though "there may no doubt be cases in which the act of the contractee, in regard to his dealings with or proceedings against the agent, with full knowledge of the facts and freedom of choice, may be such as to preclude him in point of law from afterwards resorting to the principal;" *Curtis v. Williamson*, L. R. 10 Q. B. 57, where filing an affidavit for the purpose of proving under the agent's liquidation was held not to amount to an election; see also *Scarf v. Jardine*, 7 App. Cas. 345, where an election was held to have been made; and *Dunn v. Newton*, C. & E. 278.

A distinction must further be noted between the case where an agent makes a contract on behalf of his unknown principal and so establishes privity between his principal and the other party, and the case where the so-called agent having a contract with his principal effects a sub-contract with a third party to carry out his own. In the latter case no privity of contract is created between the principal and the third party; see *New Zealand Co. v. Ruston*, 5 Q. B. D. 474, reversed 7 Id. 374; *Maspons v. Mildred*, 9 Id. 530, 8 App. Cas. 874; *Ireland v. Livingston*, L. R. 5 H. L. 395, 408, *per* Blackburn, J.

Rule 2.

2. That the rule is the same where he states himself to be an agent, but does not name his principal. Further, the rule is the same, though he names his principal, if the other contracting party does not, at the time of making the contract, trust the agent exclusively; *Calder v. Dobell*, L. R. 6 C. P. 486.

In these two rules it is assumed that the form of the contract is such as to render the agent at all events personally liable on it.

Rule 3.

3. That if he state himself to be an agent, but have really no principal, *he is, in law, himself the principal*, unless, having had at one time authority, its determination was not

and could not be known to him; *Smout v. Ilbery*, 10 M. & W. 1; or unless his want of authority is known to the other party; *Jones v. Downman*, 4 Q. B. 235, 239, where Story on Agency, § 265, ed. 1839, was cited with approbation.

This third rule, which applies only to cases where by the form of the contract the personal liability of the agent as a party thereto is excluded, seems to be true only where there is no person in existence at the time when the contract is made, who might be such principal: as in *Kelner v. Baxter*, L. R. 2 C. P. 174, where the defendants were held liable on a contract signed by them "on behalf of" a company not then formed, the document being construed *ut res magis valeat quam pereat*; see also *Scott v. Ebury*, Id. 255. The rule thus modified seems to be one of construction rather than of law, and can hardly be considered exhaustive. See *Hollman v. Pullin*, C. & E. 254.

Where no principal in existence agent may be liable on contract.

Where the principal is in existence, but the supposed agent has no authority from him, the decisions in *Jenkins v. Hutchinson*, 13 Q. B. 744; *Lewis v. Nicholson*, 18 Id. 503; *Randell v. Trimen*, 18 C. B. 786; and *Collen v. Wright*, 7 E. & B. 301, 8 Id. 647, have established that he cannot be treated himself as principal and be sued *on the contract*, but is liable in an action upon his implied promise that he really possessed the authority which he affected to have; in other words, that *he was what he represented himself to be*, namely, an agent having authority to contract on behalf of his principal; see *Dickson v. Reuter's Telegraph Co.*, 2 C. P. D. 62, 68, 3 Id. 1.

Where principal in existence agent liable not on contract, but for breach of warranty of authority.

The question of the personal liability of an agent contracting without authority in the name of another, was much considered in the important case of *Smout v. Ilbery*, 10 M. & W. 1, above referred to. That was an action for necessities supplied to the defendant between the time of her husband's death, on a voyage to China, and of the receipt of the intelligence in England. It was held that she was not liable, upon the ground that she did not, and *could not*, know of the determination of her authority to contract. In the luminous judgment delivered in that case, the cases where agents have been held to be personally responsible were divided into three classes:—

Smout v. Ilbery.

1. Where the agent makes a fraudulent representation of his authority with intent to deceive.

2. Where he has no authority and knows it, but nevertheless makes the contract as having such authority.

3. Where, not having in fact authority to make the contract as agent, he yet does so under the *bonâ fide* belief that such authority is vested in him, as in the case of an agent acting under a forged power of attorney, which he believes to be genuine, and the like.

As to the form of action in which agents within these three classes can be made liable, it has been seen that they cannot be sued upon the contracts which they have entered into without authority, on behalf of their assumed principals, unless they can be shown to be themselves principals. It seems clear, however, that agents within the first and second classes would be liable in an action of deceit for false representation, although it seems equally clear that that form of action would not be applicable to the case of agents within the third class, the representation of authority being *bonâ fide* (see the notes to *Pasley v. Freeman*, ante, p. 80). An action, however, on an implied contract for the existence of the authority each professed to have, would appear to include all three classes.

*Collen v.
Wright.*

In *Collen v. Wright*, 7 E. & B. 301, 8 Id. 647, the action was brought against the executors of A., who had signed an agreement, describing himself as the agent of B., to grant to the plaintiff a lease of a farm belonging to B. Both the plaintiff and A. believed at the time that A. had authority from B. to make the agreement; but A. had, in fact, no such authority. B. having refused to grant the lease, the plaintiff sued him for specific performance, but the suit failed because A. had no authority from B. Upon these facts it was held that the plaintiff was entitled to recover from A.'s executors, as damages, the costs of the suit in equity, since it did not appear that this suit had been incautiously instituted, and consequently these damages resulted naturally from the misrepresentation made by A.

The decision of the Court of Exch. in *Collen v. Wright* was affirmed in the Exch. Cham. (8 E. & B. 647), Cockburn, Per Willes, J. C.J., dissenting. Willes, J., in delivering the judgment of the majority of the court, said: "The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another, impliedly, if not expressly, undertakes to, or promises, the person who enters into such contract upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist. The fact of entering

into the transaction with the professed agent, as such, is good consideration for the promise."

The decision in *Collen v. Wright* has been repeatedly followed in later cases; see *Simons v. Patchett*, 7 E. & B. 568; *Warlow v. Harrison*, 1 E. & E. 295, 309; *Cherry v. Colonial Bank*, L. R. 3 P. C. 24; *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Weeks v. Propert*, L. R. 8 C. P. 427; *Dickson v. Reuter's Co.*, 3 C. P. D. 1; *Chapleo v. Brunswick Society*, 6 Q. B. D. 696; *West London Bank v. Kitson*, 13 Id. 360; *Firbank v. Humphreys*, 18 Id. 54; *Elkington v. Hurter*, (1892) 2 Ch. 452. But an agent is not liable for a mistaken representation of law; *Rashdall v. Ford*, 2 Eq. 750; *Beattie v. Ebury*, 7 Ch. 777, L. R. 7 H. L. 102; see *Weeks v. Propert*, *supra*; *Eaglesfield v. Londonderry*, 4 Ch. D. 693; and *West London Bank v. Kitson*, *supra*.

Collen v. Wright followed.

Representation of law.

In *Lilly v. Smales*, (1892) 1 Q. B. 456, where shipbrokers signed a charter-party "by telegraphic authority of . . . as agents," in an action against them for breach of warranty of authority, evidence was admitted to prove that, by the usage of the trade, that form of signature was used in order to negative any further warranty of authority than that they had received a telegram which, if correctly transmitted, authorised them to sign such a charter-party.

Form of contract limiting warranty of authority.

It must be observed that the damages recoverable, in cases of this description, against the supposed agent are not identical with those which would have been recoverable from the principal (had the agency existed) for not fulfilling the contract; see *Richardson v. Williamson*, *supra*, per Blackburn, J.; *Weeks v. Propert*, *supra*; *Re National Coffee Palace Co.*, 24 Ch. D. 367. The measure of the damages recoverable against the supposed agent is, in ordinary cases of this kind, the actual loss sustained by the plaintiff by reason of his not having the valid contract which the agent impliedly warranted that he should have; *Simons v. Patchett*, 7 E. & B. 568; *Re Nat. Coffee Palace Co.*, *supra*; *Meek v. Wendt*, 21 Q. B. D. 126, W. N. 1889, 14; see also *Pow v. Davis*, 1 B. & S. 220; *Hughes v. Græme*, 33 L. J. Q. B. 335; *Spedding v. Nevell*, L. R. 4 C. P. 212; *Godwin v. Francis*, 5 Id. 295.

Measure of damages recoverable against agent.

The costs of an action brought against the supposed principal are recoverable as damages for breach of the warranty of authority, if they have been reasonably incurred; *Randell v. Trimen*, 18 C. B. 786; *Collen v. Wright*, *supra*; *Richardson v. Dunn*, 8 C. B. N. S. 655; *Hughes v. Græme*, *supra*; *Spedding v. Nevell*, *supra*; *Godwin v. Francis*,

Costs of action against supposed principal.

supra; see *Hammond v. Bussey*, 20 Q. B. D. 79. See also the notes to *Lampleigh v. Brathwait*, vol. i. pp. 149, 150.

Liability for signing person's name to a negotiable instrument without authority.

45 & 46 Vict. c. 61.
S. 97.

One of the shapes in which the question of the personal liability of an unauthorised person acting as agent sometimes presents itself is where he has, without authority, signed a third person's name to some negotiable instrument. The law as to bills of exchange, cheques, and promissory notes is now codified by the Bills of Exchange Act, 1882, which, however, provides (s. 97, sub-s. 2), that "the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques."

Forged or unauthorised signature.
S. 24.

By s. 24, a forged or unauthorised signature is wholly inoperative, and gives no right to retain, discharge, or enforce payment of the bill, "unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority."

Person signing as agent.
S. 26.

S. 26 (1) provides that "where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability." And (sub-s. 2) "in determining whether the signature is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted."

Liability of agent who has put his own name to a negotiable security.

The cases of *Leadbitter v. Farrow*, 5 M. & S. 345, *Le Fevre v. Lloyd*, 5 Taunt. 749 (see this case, however, explained in *Castrique v. Buttigieg*, 10 Moo. P. C. 94, 114), and *Sowerby v. Butcher*, 2 C. & M. 368, show that, before this Act, an agent drawing, accepting, or indorsing negotiable securities in his own name was personally liable upon them to the holder. And a drawee, who accepted a bill as agent for a company in which he was a shareholder, was held liable as acceptor; *Nicholls v. Diamond*, 9 Exch. 154. In *Alexander v. Sizer*, L. R. 4 Ex. 102, the defendant, who signed a promissory note "as secretary," was held not personally liable. In *Dutton v. Marsh*, L. R. 6 Q. B. 361, the directors of a company were held to have made themselves personally liable on a note signed by them, though the company's seal was affixed; but see *Okell v. Charles*, 34 L. T. 822, where

the directors were held not to be liable. In *Herald v. Connah*, Id. 885, the general agent of a foreign company was held liable on a bill of exchange, accepted by him on behalf of the company, the bill being directed to him.

There has been a numerous class of decisions as to what is a state of facts which shows that the agent has constituted himself an actual contracting party, and not a mere agent. Thus, in *Kennedy v. Gouveia*, 3 D. & R. 503, the decision was, upon the facts of the case, that the defendant had contracted as principal; so likewise in *Harper v. Williams*, 4 Q. B. 219. In *Tanner v. Christian*, 4 E. & B. 591, a written agreement was expressed to be made between "A., for and on behalf of B., of the first part, and C. of the second part." By this agreement "A. on the part of B." agreed to let C. a house for a term of years, C. paying rent to "A. for the use of B." The document contained stipulations with reference to particular acts which were not to be done on the premises without the "consent in writing of A. on the part of B.," and also with reference to the execution by the tenant of the counterpart of a lease when called on to do so "by A. on the part of B." A. signed the agreement in his own name. Upon these facts it was held that it sufficiently appeared to be the intention of the parties that A. should himself contract, and that therefore he was personally liable.

Cases in which the agent has been held on the facts to have contracted as principal.

And in a later case, where a charter party was expressed to be made "between A., of the good ship *Celerity*, and B., agent for C. D. and Son, of Devonport, merchants," to whom the ship was to be addressed, and was signed by B. without any restriction, the court was of opinion, in an action brought on the contract against B., that he was personally liable as charterer. "Though it is not necessary," said Lord Campbell, "in the view which I take of this case, to decide the question whether the defendant bound himself personally by this contract, we ought not to allow any doubt to exist as to our opinion on the construction of such a contract. I can have no doubt myself that the defendant is personally liable. He makes the contract, using apt words to show that he contracts; and the only ground suggested for rebutting his personal liability is, that he says he is agent for another: but he may well contract and pledge his personal liability, though he is agent for another. If he had signed the contract as by *procuracion* for C. D. and Son, he might have exempted himself from liability" (see *Stagg v.*

Parker v. Winlow.

Elliott, 12 C. B. N. S. 373), "but on principle, and on the authorities cited, an agent is liable personally, if he is the contracting party; and he may be so though he names his principal;" *Parker v. Winlow*, 7 E. & B. 942; see *Williamson v. Barton*, 7 H. & N. 899; *Hutcheson v. Eaton*, 13 Q. B. D. 861.

*Lennard v.
Robinson.*

There is another case (which, however, it is submitted, is not reconcileable with *Gadd v. Houghton*, cited below), where a charter-party was entered into by merchants in London, who in the body of the contract appeared to be the contracting parties, but who signed it "by authority of and as agents for" a merchant at Memel, and it was held that they were notwithstanding personally liable on the contract; *Lennard v. Robinson*, 5 E. & B. 125. See also *Paice v. Walker*, L. R. 5 Ex. 173, as to which case, however, James, L.J., said, in *Gadd v. Houghton*, 1 Ex. D. 357, that "the decision in that case ought not to stand." In *Paice v. Walker* the sold note of 200 quarters of wheat was signed by the defendant's firm Walker & Strange, without qualification. The bought note commenced, "Bought of Walker & Strange, London, about 200 quarters wheat, as agents for John Schmidt & Co., of Danzig." The defendant was held personally liable.

*Paice v.
Walker.*

*Gadd v.
Houghton.*

In *Gadd v. Houghton*, *supra*, the contract ran: "Mr. Gadd, We have this day sold to you, on account of Morand & Co., Valencia, 2,000 cases of Valencia oranges. Houghton & Co." The defendants were held not to be liable as contracting parties. "The *ratio decidendi* in *Paice v. Walker*," said James, L.J., in *Gadd v. Houghton*, "was that, having regard to the contract and all the circumstances of the case, the words 'as agents' must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain 'on account of' another person. These are the very words used in the present case. When a man says that he is making a contract 'on account of' someone else, it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself, but is binding his principal. As to *Paice v. Walker*, I cannot conceive that the words 'as agents' can be properly understood as implying merely a description." Mellish and Baggallay, L.JJ., and Archibald, J., concurred in thinking *Paice v. Walker* distinguishable, but expressed no opinion upon the latter case.

*Weidner v.
Hoggett.*

In *Weidner v. Hoggett*, 1 C. P. D. 533, the defendant, who was a clerk to the Bebside Colliery Co., was held per-

sonally liable on a contract signed by him as follows: "On account of Bebside Colliery, W. Hoggett." But his liability in this respect seems hardly to have been contested. *Gadd v. Houghton* was followed in *Ogden v. Hall*, 40 L. T. 751; and in *Haigh v. Stuart*, W. N. 1890, 213, where Lord Esher thought that *Paice v. Walker*, and also *Hough v. Manzanos*, 4 Ex. D. 104, were inconsistent with *Gadd v. Houghton*. These two cases, and also *Lennard v. Robinson* and *Weidner v. Hoggett*, must therefore be considered, as regards the liability of the agent, of doubtful authority.

The fact that the signature is expressed to be made "as agent" is strong to show that the person signing does not mean to bind himself personally, if the terms of the contract itself do not show a contrary intention. In *Deslandes v. Gregory*, 2 E. & E. 602, 610, a charter-party, dated London, began as follows:—"It is this day agreed between A. B. & Son, owners of the good ship, &c., of the one part, and C. D. Brothers, *as agents to E. F.*, of Anamaboe, merchants and charterers, of the other part." The voyage was to be to Africa and back, and the words "merchants and charterers" were printed in the plural throughout the charter-party. The instrument concluded: "the charterers to have liberty to send any passengers out or home," and was signed thus:—"For A. B. & Son, of Jersey, owners, G. H. as agent,—For E. F., of Anamaboe, C. D. Brothers, *as agents.*" An action having been brought upon this contract by the shipowners against C. D. Brothers, it was held in the Q. B., and afterwards on appeal in the Exch. Cham., that the defendants were not liable on the charter-party as principals. "We are all of opinion," said Williams, J., delivering the judgment of the Court of Error, "that the judgment of the Court of Queen's Bench was right. The form of the agreement and the mode of signature, taken together, are quite conclusive that the defendants did not sign this contract for themselves as principals: they sign 'E. F., of Anamaboe, C. D. Brothers, as agents.' It would require extremely strong words in the body of the contract to control the effect of that form of signature, but no such words are to be found there; the contract purporting to be made by C. D. Brothers, as agents to E. F., of Anamaboe, merchants and charterers. The only argument for the plaintiffs rests on the circumstance that the words 'merchants' and 'charterers' are in the plural." See also *Fairlie v. Fenton*, L. R. 5 Ex. 169, and *Gadd v. Houghton*, *supra*.

Effect of
signature
"as agent."

Deslandes v.
Gregory.

Receiver and manager appointed by the court.

A receiver and manager of a business, appointed by the court, is personally liable upon contracts made by him in the course of carrying on the business, unless such contracts were made upon the terms that he should not be personally liable; *Burt v. Bull*, (1895) 1 Q. B. 276. In that case a receiver and manager of a business, appointed by the court, gave an order for goods to be used in the business, which was expressed to be "For Joseph Bull & Co., Limited, receiver and manager, E. C. Bull," and he was held to be personally liable for the price. See *Owen v. Cronk*, (1895) 1 Q. B. 265. Where a person, who is an agent of the Government, contracts, the presumption is that he does not bind himself personally; *Macbeath v. Haldimand*, 1 T. R. 172; *Unwin v. Wolseley*, Id. 674; see *Palmer v. Hutchinson*, 6 App. Cas. 619.

Rule to determine whether agent contracts as principal.

In all these cases the question whether the person actually signing the contract is to be deemed to be contracting personally, or as agent only, depends upon the intention of the parties as discoverable from the contract itself; and it may be laid down as a general rule, that *where a person signs a contract in his own name, without qualification, he is primâ facie to be deemed to be a person contracting personally*: and, in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal; see *Cooke v. Wilson*, 1 C. B. N. S. 153; *Green v. Kopke*, 18 C. B. 549; *Oglesby v. Yglesias*, E. B. & E. 930; *Milvain v. Perez*, 30 L. J. Q. B. 90; *Reid v. Dreaper*, 6 H. & N. 813; *Lindus v. Melrose*, 2 Id. 293, 3 Id. 177; *Bottomley v. Fisher*, 1 H. & C. 211; *Hough v. Manzanos*, 4 Ex. D. 104, 106; *Hick v. Tweedy*, 63 L. T. 765. See, however, *Young v. Schuler*, 11 Q. B. D. 651, where parol evidence was under peculiar circumstances held admissible as to the capacity in which the defendant signed a contract; and *Adams v. Hall*, 37 L. T. 70.

Effect of inducing vendor by fraud to supply goods.

Very similar to the last of the three rules mentioned at p. 380 is the doctrine in those cases which have been said to warrant the proposition that where A. by fraud induces B. to supply goods to a person with whom B. would not have dealt had it not been for such fraud, there B., the vendor, on discovery of the fraud, may treat A. as a principal, and sue him in *indebitatus assumpsit* for goods sold and delivered, if A. have himself taken possession of the articles supplied; see *Biddle v. Levy*, 1 Stark. 20;

Hill v. Perrott, 3 Taunt. 274; *Abbotts v. Barry*, 2 B. & B. 369; *Lucas v. Godwin*, 3 B. N. C. 737; and *Wilson v. Hart*, *post*, p. 394; but see also *Selway v. Fogg*, 5 M. & W. 83.

It may be a question of some curiosity how far this doctrine, if pushed, might affect the operation of Lord Tenterden's Act, s. 6, set out and commented upon in the note to *Chandelor v. Lopus*, *ante*, p. 55. Since the first edition of this note this question in some degree arose in *Haslock v. Fergusson*, 7 A. & E. 86, where the plaintiff sued for money had and received. His case was that one H. having obtained his goods on credit by means of the defendant's false representation as to H.'s character, had applied part of their produce in paying a debt due to the defendant himself. The false representation was by parol, and the court held that it could not be given in evidence, being the only fact on which the plaintiff's case rested. This case in principle resembles *Carrington v. Roots*, 2 M. & W. 248, decided on the Statute of Frauds. See also *Turnley v. Macgregor*, 6 M. & Gr. 46.

Although the person who has dealt with an agent, believing him to be a principal, may elect to treat the after-discovered principal as having contracted with him; still the rule has been generally laid down that if the principal, *following the ordinary course of business*, have, *after his liability to the contractor is complete*, altered the state of his accounts with the agent, this right of the contractor exists subject to the state of those accounts; see the text of *Thomson v. Davenport*.

Effect of alteration of accounts between agent and principal.

In *Kymer v. Suwercropp*, 1 Camp. 109, on the 10th, 17th, and 24th June, Kenyon, as broker for the defendant, bought coffee from the plaintiff, who did not, however, discover the agency till the 8th July, on which day Kenyon became insolvent; part of the coffee the defendant had received, and had paid Kenyon for it, by an acceptance at one month, dated 15th June, which was cashed when due. At the expiration of one month from each of the respective days of sale, which were respectively the *days of prompt* in that trade, the plaintiff demanded payment from the defendant. Lord Ellenborough held the defendant liable for the price. "A person," said his lordship, "selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought. . . . If he lets the day of payment go by, he may lead the principal into the supposition that he relies solely on the

Kymer v. Suwercropp

broker; and if, in this case, the price of the goods has been paid to the broker, on account of the deception the principal shall be discharged. But here payment was demanded from the defendant on the several days when it became due, and no reason was given him to believe that his broker alone was trusted." In the above sentences his lordship laid down the general rule, the exception, and the limitation to that exception; the general rule being, that the contractor may elect between the agent and the unknown principal, upon the discovery of the latter; the exception, that if the state of accounts between the principal and agent have been altered, he elects subject to the state of those accounts; and the limitation to that exception, that the alteration in the state of the accounts must, in order to deprive the contractor of his election, be made after the liability of the principal has accrued, that is, after the right of acting upon the election has once vested. And, speaking generally, the right of the seller to resort to an undiscovered principal may be barred by circumstances which show that its exercise would, as between the creditor and the principal, be unjust. See *Smyth v. Anderson*, 7 C. B. 21, where *Kymer v. Suwercropp* is elaborately examined; *Heald v. Kenworthy*, 10 Exch. 739; *Smethurst v. Mitchell*, 1 E. & E. 622.

*Armstrong v.
Stokes.*

In *Armstrong v. Stokes*, L. R. 7 Q. B. 598, this part of the subject was elaborately discussed, and a distinction drawn between the case of an agent known to have an unnamed principal, and that of an agent supposed to be himself the principal. The court expressed an opinion that "*Waring v. Favenck*, 1 Camp. 85, and *Kymer v. Suwercropp*, Id. 109, which were tried before Lord Ellenborough in 1807, are generally cited on this subject without, as it seems to us, paying sufficient attention to the fact that Kenyon and Co., in consequence of whose insolvency the question arose, were London brokers, not commission merchants." They then pointed out that "in every case where the sale is to a broker, the vendor knows that there is, or ought to be, a principal between whom and himself there is established a privity of contract, and whose security he has in addition to that of the broker; and the principal also knows that the vendor is aware of this, and to some extent trusts to his liability. This is, therefore, a very different kind of case from that of a person selling goods to a person whom at the time of the contract he supposes to be a principal."

The court then discussed the *dictum* of Parke, B., in

Heald v. Kenworthy, 10 Exch. 739, 747, that a payment made to the agent by his principal does not preclude the seller from recovering from the principal, "unless it appears that he has induced the principal to believe that a settlement has been made with the agent." Whilst admitting that Parke, B., probably never intended to qualify this general rule by any exception not expressed by him, and that both Pollock, C.B., and Alderson, B., assented to his judgment, the court declined to hold that the rigid rule thus laid down was applicable to cases where the existence of a principal has not been discovered until after payment has been fairly made by him to his agent. In such cases they considered an exception to the above rule to exist, and that the payment to the agent discharges the principal, because at the time of the payment the seller is looking to the agent alone.

Effect of payment to the agent by the principal.

In *Irvine v. Watson*, 5 Q. B. D. 102, 414, the above distinction between the case where the agent who effects the contract is supposed by the seller to be a principal, and the case where, though contracting in his own name, he is known to have a principal, was adopted by Bowen, J.; and he held that *in the latter case* payment by the principal to his own agent does not give to the principal any defence as against the seller unless the seller's conduct had been such as to mislead the principal to pay his agent. He further held that mere omission on the seller's part to require prepayment by the agent, the terms of the sale being payment by "cash on or before delivery," was not misleading conduct within the above rule. In the C. A. this decision was affirmed upon both points; but the court questioned the correctness of the distinction drawn in *Armstrong v. Stokes*, and seemed disposed to hold that payment by the principal to his agent in such case would not have discharged the principal as against the seller, even though the seller did not know at the time of effecting the contract that the agent had a principal behind him. In *Davison v. Donaldson*, 9 Q. B. D. 623, the C. A. followed *Irvine v. Watson*; but in this case also the agent was known to have an unnamed principal: so that the last-mentioned point did not require to be, and was not, decided.

Irvine v. Watson.

The undisclosed principal of an agent who has, contrary to his instructions, bought goods on credit, is liable to the seller if the buying of such goods on credit would usually be within the authority of such an agent; *Watteau v. Fenwick*, (1893) 1 Q. B. 346. See *ante*, vol. i., p. 352.

Effect of rule that written instrument cannot be contradicted by parol testimony.

Some difficulty has been thought to surround the creditor's right of election, arising out of that inflexible rule of the law of evidence, commented on in *Wigglesworth v. Dallison*, ante, vol. i., p. 528, viz., that the terms of a written contract cannot be qualified or contradicted by parol testimony. It has been said, if A. contract in writing without naming his principal, so that he appears upon the writing to be himself the principal, does not a creditor who seeks to show that, while thus professedly contracting for himself, he *really* contracted for a principal, endeavour to infringe this rule of evidence, by adding to the written contract a new term at variance with the written terms? This question, it is, however, apprehended, must receive different answers upon different occasions, answers varying according to the object with which it is sought to introduce the parol testimony, which, it is submitted, never can be heard for the purpose of *discharging* the agent, but may always be so for that of *charging* the principal.

Parol evidence inadmissible to discharge apparent principal.

That parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he mentioned his principal at the time of entering into it, seems to be now well established.

Though it may be shown that contract was not intended to operate so as to charge him,

The agent may, however, show, as an equitable defence to an action on the contract which describes him as principal, that by the real agreement it was expressly agreed that he was not to be liable as principal, and that the person suing him is inequitably taking advantage of a mutual mistake in the written contract; *Wake v. Harrop*, 6 H. & N. 768, 1 H. & C. 202; and this is consistent with the rule, acted on in other cases, that even where a document purporting to be a contract has been signed, it is always open to the parties to show that it was not their real intention that it should operate as a contract; see *Pym v. Campbell*, 6 E. & B. 370; *Rogers v. Hadley*, 2 H. & C. 227; *Lewis v. Brass*, 3 Q. B. D. 667; *Clever v. Kirkman*, 32 L. T. 672. See also, ante, vol. i., p. 302.

Magee v. Atkinson. Custom inadmissible to discharge contracting party.

In *Magee v. Atkinson*, 2 M. & W. 440, in an action of *assumpsit* for the non-delivery of shares, it appeared that the defendant, who was a share-broker, sold the shares, on account of Jacob, to Scholes, the plaintiff's agent: he then told his clerk that he had sold them to Scholes, on which the clerk booked the sale as a sale from the defendant to

Scholes, and sent a contract note to the same effect to Scholes: the defendant, however, shortly afterwards altered the book by inserting Jacob as the seller, and sent another note to Scholes, in which Jacob appeared as seller. Patteson, J., left it to the jury to say whether the second note was a correction of a mistake in the first; and he told them "that if the defendant entered into a written contract in his own name, he could not afterwards set up that he was acting as broker merely; and though known to be an agent, if the defendant signed the contract in his own name, he was liable." Evidence was tendered to show a custom to send in broker's notes without disclosing the principal's name, but this evidence was rejected. The jury found a verdict for the plaintiff, and the Court of Exch. approved of the above direction. "I do not see," said Parke, B., "any default in the rejection of the evidence, because the evidence tendered was to alter the written contract." "The custom offered to be proved," said Alderson, B., "was a custom to violate the common law of England." See *Jones v. Littledale*, 6 A. & E. 486; *Holding v. Elliott*, 5 H. & N. 117, where *Jones v. Littledale* was doubted; *Humfrey v. Dale*, 7 E. & B. 266, E. B. & E. 1004, *post*, p. 397; and *Reid v. Dreaper*, 6 H. & N. 813.

This doctrine was confirmed and established in *Higgins v. Senior*, 8 M. & W. 834, after an elaborate argument, in which all the cases were cited, and their bearing fully discussed. See also *Cropper v. Cook*, L. R. 3 C. P. 194, 199, *per* Willes, J.; *Calder v. Dobell*, 6 Id. 486; and *Hutcheson v. Eaton*, 13 Q. B. D. 861, where an alleged custom discharging the contracting party, a broker, on his giving the name of his principal, was negatived by a jury.

Higgins v. Senior.

In the earlier cases, *Wilson v. Hart*, 7 Taunt. 295, was cited as an authority in favour of the admissibility of the parol evidence. This case has occasioned some confusion, arising mainly from the too great generality of the marginal note, in which it is broadly stated that "the Statute of Frauds does not exclude parol evidence that a contract for the sale of goods, purporting to have been made between A., the seller, and B., the buyer, was, on B.'s part, made by him only as agent for C." On examination, however, it will be found to be no *direct* authority as to the admissibility of the evidence in any case; and so far as it is of weight upon this subject, it will be found only to support the second of the two propositions above submitted, namely, that the parol

Wilson v. Hart not inconsistent with this rule.

evidence may be admitted to charge the principal, though not to *discharge* the agent.

*Wilson v.
Hart.*

In *Wilson v. Hart*, Reed being indebted to Hart, who was pressing him for payment, said he thought he could get credit for wool, which Hart wanted, and accordingly procured a broker to purchase some from Clarke, telling the broker that he was commissioned to buy it by Hart. The broker bought it, after its inspection by Hart, and the bought note and invoice both named Reed as the buyer. In an action brought by the assignees of Clarke, the seller of the wool, against Hart, for the price, Gibbs, C.J., told the jury, "that the question for them was, whether it was a sale to the defendant or to Reed; if they thought it was a fraud between the defendant and Reed, to pay the defendant's debt with Clarke's wool, they might find for the plaintiffs. The written documents favoured the defendant's case, but if the jury thought that the defendant had all along intermeddled with the sale, and induced the plaintiffs to think he was going to pay them, notwithstanding the sale was in form to Reed, they might find for the plaintiffs." The jury found a verdict for the plaintiffs, and a motion was made for a new trial, on the ground, 1st, That there was no contract between Clarke and the defendant within the Statute of Frauds, s. 17; 2ndly, That parol evidence ought not to have been received for the purpose of altering the effect of the written contract. The court refused the rule.

*Wilson v.
Hart* turned
upon fraud.

Now it is plain that, in deciding the above case, it was not necessary to go further than to say that where a man gets goods into his hands by fraud, he may be charged with their price in *assumpsit*. So far this case is an authority in support of the doctrine deduced in a former part of this note, p. 388, from *Biddle v. Levy*, *Hill v. Perrot*, and *Lucas v. Godwin*, and could involve no question concerning the written contract, because the *assumpsit* would be raised, not out of that, nor by its aid, but from the acts of the defendant in possessing himself of the goods by means of a delusion practised upon Clarke. Such was, moreover, the view taken by the court. "The case was left to the jury," said Dallas, J., "*on a question of fraud*, and the jury have, on the whole, drawn a conclusion that this was a contrivance between the defendant and Reed, for the purpose I have mentioned, and this was legitimately a question for the jury." It is true that Park, J., said: "It is the constant course to show by parol evidence whether a contracting party is agent or principal.

This evidence was properly admitted." The decision of the case, however, turned, as has been shown, altogether upon the fraud; see *per* Blackburn, J., *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 606; *per* Lindley, L.J., *Maspons v. Mildred*, 9 Q. B. D. 530, 544.

But, even had it turned upon the admissibility of the evidence, it would not have been at all at variance with *Magee v. Atkinson*, since the evidence would have been admitted not to discharge Reed, but to charge Hart. This explanation of *Wilson v. Hart*, after the publication of the first edition of this note, received the sanction of the Court of Exch., in *Higgins v. Senior*, 8 M. & W. 834.

But at all events does not decide that apparent principal may be discharged.

The next proposition above submitted is, that parol evidence that the person who has signed as principal was in reality an agent, ought not to be excluded, when the purpose for which it is offered is that of charging the principal with the contract.

Parol evidence admissible to charge undisclosed principal.

The principle on which it is submitted that this depends, is adverted to in the text of *Paterson v. Gandasequi*, which states that "it was moved to set aside the nonsuit, on the ground of assimilating this case of a dormant principal to that of a dormant partner, where, though the person furnishing goods to the ostensible partners intended, at the time, to give credit only to them, yet he may afterwards pursue his remedy against the dormant partner when discovered." And this, it is submitted, is the true principle. A dormant partner is sued on the ground of agency; he is liable on a contract relating to the firm made in the ostensible partner's name alone, because he is taken to have adopted the name of the ostensible partner as his own, for the purpose of such contracts. So that, when the ostensible partner signs his name to such contracts, he signs a word, the meaning of which comprehends not himself alone, but his partner also. It is, in fact, a question of signification. A. & B. trade under the name of "A.;" the name "A." therefore, when used in a contract relating to such trade, means "A. & B.;" and to show that it has such meaning parol evidence is admissible, but admissible only for the purpose of charging B., for *De Mautort v. Saunders*, 1 B. & Ad. 398, decided that it cannot be admitted to discharge the ostensible partner. Now, if B. may contract jointly with A., under the name of A., and employ A. to sign it, there is no reason why he should not contract individually in the same way; and if he may do so, then parol evidence must

be admissible to show that A., being his agent, so contracted for him.

This view will be, it is submitted, borne out by an examination of the authorities. In *Paterson v. Gandasequi*, the order for the goods was in writing, signed only by Larrazabal and Co.; no objection was made to the admissibility of the parol evidence. In *Thomson v. Davenport*, *Railton v. Hodgson*, and *Peele v. Hodgson*, the invoices, which appear to have contained the terms of the contracts, were made out to the respective agents.

Above point
decided in
Trueman v.
Loder.

In *Trueman v. Loder*, 11 A. & E. 589, 594, the point was expressly decided. "Parol evidence," said Lord Denman, in that case, "is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or by that of an agent, are inquiries not different in their nature from the question—Who is the person who has just ordered goods in a shop? If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own." See *Young v. Schuler*, 11 Q. B. D. 651.

Admissibility
of evidence
of custom.

The point actually decided in *Trueman v. Loder* has not been since doubted; but a rule laid down by the court in that case, which was not in fact necessary to its decision, led, in *Humfrey v. Dale*, 7 E. & B. 266, E. B. & E. 1004, to much discussion. In *Trueman v. Loder* the action was brought for non-delivery of tallow, the sale having been effected through a broker, who acted for both parties. The bought and sold notes were signed by the broker: in the former, the purchase was described to be for the plaintiffs, naming them; in the latter, the sale was expressed to be "for E. H., to my principals." The main struggle in the case was to make the defendant liable as trading under the name of E. H.; and evidence was admitted by the court for the purpose of showing that the defendant had employed E. H. to represent him, and to act for him under that name. At the trial the broker was called, and the defendant sought to put to him this question—"Is it not a custom in the tallow trade that, under contracts similar to that in the present case, a party may reject the undisclosed principal, and look to the broker for the completion of the contract?" The judge refused to allow this question to be put, and the court afterwards confirmed his ruling in this respect. This

question had, it would seem, no bearing on the matter in issue, where the contract apparently disclosed both principals, and the plaintiff was seeking to enforce it against a person whom he treated as a disclosed principal; at all events, the correctness of the decision in *Trueman v. Loder* was not affected by the rejection of this evidence. See the judgment of the Q. B. in *Humfrey v. Dale*, *supra*.

In *Humfrey v. Dale* the action was brought to recover damages for non-acceptance of oil alleged to have been sold by the plaintiff to the defendants. The plea denied the contract. The plaintiff had employed T. & M., brokers, to sell the oil for him; and the defendants, also brokers, being employed by S. to buy oil, sent to T. & M. a sold note as follows:—"Sold this day for T. & M. to our principals 10 tons of linseed oil of merchantable quality, at 44*l*. per ton, real tare and usual draft, to be free delivered," &c. This note was signed by the defendants, describing themselves as brokers, and at the foot was written, "Quarter per cent. brokerage to D. & Co." (the defendants). At the time of the sale the defendants did not disclose the name of their principal, S., who afterwards became insolvent and did not accept the oil. The plaintiff then sued the defendants for not accepting the oil, treating them as the buyers. On the trial he proved a custom in the trade, that when brokers bought without disclosing their principal's name, they were themselves liable to be looked on as the buyers, and a verdict was found for the plaintiff. Upon a motion to enter a nonsuit, on the ground, amongst others, that the evidence of the alleged custom was not admissible, the court held that the evidence had been properly received, since it did not contradict the written instrument, but only explained its terms, or tacitly added an implied incident. In the judgment of the court, the earlier cases, and especially *Trueman v. Loder*, were commented upon. The case was afterwards taken on appeal to the Exch. Cham. (*Dale v. Humfrey*, E. B. & E. 1004), where the decision of the Q. B. was affirmed (Martin and Channell, BB., and Willes, J., dissenting), the majority of the court adopting the reasoning in the judgment of the court below, and being of opinion that the evidence in question did not vary, but simply explained, the terms of the contract. The case of *Humfrey v. Dale* has been constantly followed; see *Fleet v. Murton*, L. R. 7 Q. B. 126; *Hutchinson v. Tatham*, L. R. 8 C. P. 482. In the latter case evidence of custom was held

Evidence of custom admissible to charge broker on contract though made by him as broker.

Humfrey v. Dale.

admissible to charge defendants upon a charter-party signed by them "as agents to merchants," in case of their not disclosing their principals within a reasonable time. The remarkable effect of these decisions is to establish that in the case of a contract, excluding *primâ facie* the liability upon it of the agent who effected it, evidence of custom may be given fixing the agent with liability upon it, at any rate in a certain event; in other words, such a custom is held not inconsistent with such a contract; for, as pointed out in the note to *Wigglesworth v. Dallison*, evidence of custom is not admissible to contradict a written contract. An explanation has been suggested with regard to *Humfrey v. Dale* and *Fleet v. Murton*, that the custom only creates the liability as an incident of the employment of the broker, and that he is by the custom liable to be sued, not as a party to the contract of sale, but on a contract to indemnify his own principal if the other party to the sale fails to carry it out; see *per* Blackburn, J., in *Fleet v. Murton*, and *per* Watkin Williams, J., in *Barrow v. Dyster*, 13 Q. B. D. 635; but such an explanation of the doctrine is inconsistent with the pleadings in *Humfrey v. Dale* and *Fleet v. Murton*, and with the decision in *Hutchinson v. Tatham*, where the defendant was in no sense the plaintiff's agent.

*Pike v.
Ongley.*

In *Pike v. Ongley*, 18 Q. B. D. 708, the defendants, who were brokers, sold hops to the plaintiffs under a written contract as follows: "Sold by O. & T. to P. & Co., for and on account of owner . . . (Signed) for O. & T., S. T." The plaintiffs proved a custom in the hop trade that, if the name of the principal was not given at the time of the contract, the buyer had a right to treat the broker as principal. It was held by the C. A., reversing the decision of the Q. B. D., that the evidence of the custom was admissible, not being inconsistent with the written contract, and that the buyers had the right of suing either the principal or the broker.

Custom must
be proved.
*Southwell v.
Bowditch.*

In *Southwell v. Bowditch*, 1 C. P. D. 100, 374, the C. A. overruled a decision of the C. P. D. whereby it had been held, in a case strongly resembling *Humfrey v. Dale*, that the broker was liable as buyer, although no evidence of usage was given. The C. P. D. acted upon the view that to give to bought and sold notes of this kind a meaning making the broker liable, had been proved so often to be the usage of mercantile men, that courts of law might now take notice of this and act upon it without strict proof of the

existence of the usage in the particular case before them. This view the C. A. declined to adopt. In giving judgment, Jessel, M.R., said: "Of course it is possible that a series of decisions may have decided that sold means bought and that bought means sold in a particular kind of contract, and it is possible that those decisions may be well known to mercantile men, and that thousands of contracts have been framed upon them, and then after a long course of time the court would be bound to follow those decisions whatever might have been the *primâ facie* meaning."

His Lordship then, after observing that he was unable to find what the judges below relied upon, adverted to *Humfrey v. Dale* and *Fleet v. Murton* as being the only authorities adduced in support of their views, and pointed out that in each of those cases the usage was actually proved, and that in the absence of such proof they would have been decided otherwise. With deference the question is, it is submitted, not whether there has been a long series of decisions in courts of law on the construction of the contract, but whether there has been a long series of cases in which the usage has been proved to exist in a great multitude of trades as a matter of *fact*, so as to have established the usage as so universally recognized in the City of London that courts of law may take notice of it; see *per* Mellish, L.J., *Ex p. Powell*, 1 Ch. D. 501, 506, and *per* Brett, L.J., *Lohre v. Aitchison*, 3 Q. B. D., 558, 562. It is obvious that such cases, however multitudinous at *nisi prius*, would not be recorded in reports of decisions *in banc* when once it had been decided that the evidence as a matter of law was admissible, and therefore the lack of such reports is no proof that there have been no such cases. That there have been very many at *nisi prius* no one who is familiar with recent practice can deny. Having regard to the views expressed in *Southwell v. Bowditch*, it would be unbecoming to express an opinion whether the usage has been so firmly and universally established as to have earned judicial notice in our courts. It may be of interest, however, to mention that Willes, J., to whose judgment against the admissibility of the usage in *Humfrey v. Dale*, Jessel, M.R., especially adverted, took occasion, shortly before his death, to observe to an editor of the eighth edition of these notes, that he had changed the views stated in his judgment as to the existence of the usage sought to be established, because his experience had convinced him that it did in fact exist amongst mercantile men.

The custom
must be
proved.

Short v.
Spackman.

In future, however, the custom must, if relied upon, be strictly proved.

The case of *Short v. Spackman*, 2 B. & Ad. 962, has considerable bearing on the question of the rights of an agent for an undisclosed principal. The plaintiffs, being employed by Hudson to buy oil, employed Bentley to buy for them; Bentley applied to the defendant, who refused to sell to the plaintiffs, but, being informed they had a principal, consented, and made out the bought and sold notes to the plaintiffs, as principals. Hudson refused to recognize the contract, on which the plaintiffs treated it as their own, demanded the oil, and sued the defendant for not delivering it. The defendant objected that he had expressly refused to deal with the plaintiffs as principals; but the form of the written contract (the bought and sold notes), in which they appeared as principals, was held to entitle them to sue; Parke, J., saying: "It is found that the plaintiffs were authorized by Hudson to buy oil of the defendant, and the contract was binding both on them, and, if the defendant chose to enforce it, on Hudson."

Agent may
sue if he
contract as
principal.

It is for this *dictum* of Parke, J., that *Short v. Spackman* is cited: the decision of the case turns, as will be perceived, upon the right of the agent to sue upon the contract in his own name. That an agent who has made a contract in his own name for an undisclosed principal, may sue on it in his own name, is established by several cases, particularly *Sims v. Bond*, 5 B. & Ad. 389. "It is," said Lord Denman, delivering the considered judgment of the court in that case, "a well-established rule of law, that where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it; the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party. This rule is most frequently acted on in sales by factors, agents, or partners, in which cases either the nominal or real contractor may sue. But it may be equally applied to other cases." See also *Alexander v. Barker*, 2 Tyr. 140; *Sims v. Brittain*, 4 B. & Ad. 375; *Bastable v. Poole*, 5 Tyr. 111; *Cooke v. Seeley*, 2 Exch. 746; *per Cockburn, C.J., Risbourg v. Bruckner*, 3 C. B. N. S. 812, 822; and *per Erle, C.J., Ramazotti v. Bowring*, 7 Id. 851, 856.

True rule is
that party
may be added

Now, as far as the admissibility of the parol evidence to qualify the written contract is concerned, there is as much

objection to letting it in for the purpose of enabling the principal not named in the contract itself to sue, as for the purpose of rendering him liable to be sued. But the true rule, it is submitted, is, that the parol evidence is admissible for the purpose of introducing a new party, but never for that of *discharging* an apparent party to the contract. See this laid down in *Jones v. Littledale*, 6 A. & E. 486, *Higgins v. Senior*, 8 M. & W. 834, and *Calder v. Dobell*, L. R. 6 C. P. 486. The point was mooted but not decided in *Graham v. Musson*, 5 B. N. C. 603, where the court held that the buyer did not, by requesting the seller's agent to write a note of the contract in the buyer's book, constitute him his agent for the purpose of signing his name so as to render the entry a note in writing within the Statute of Frauds. (See as to this case the judgments in *Durrell v. Evans*, 1 H. & C. 174; and as to *Durrell v. Evans*, see the judgments in *Murphy v. Boese*, L. R. 10 Ex. 126; and *ante*, vol. i., p. 322.)

but not discharged by parol evidence.

Where an agent contracting as principal described himself in a charter-party as "owner" of the ship, it was held, in an action by the real principal, upon the charter-party, that parol evidence could not be received to show that the plaintiff was the real principal, inasmuch as it would contradict the statement of ownership by the agent; *Humble v. Hunter*, 12 Q. B. 310. In *Rayner v. Grote*, 15 M. & W. 359, the plaintiff made a written contract for the sale of goods, in which he described himself as the agent of A.; the buyer having accepted a portion of the goods after notice that the plaintiff was the real principal, it was held that the latter might sue in his own name for the non-acceptance of the residue. But it was said in the judgment that, had the contract been altogether executory, and one in which the skill or solvency of the principal could have been reasonably considered as an ingredient, or perhaps if it had been executory and wholly unperformed without such qualification, or even if it had been partly performed without the knowledge of who was the real principal, the plaintiff could not have sued in his own name; see *Bickerton v. Burrell*, 5 M. & S. 383, and *Boulton v. Jones*, 2 H. & N. 564. In *Barrow v. Dyster*, 13 Q. B. D. 635, it was held that where a contract effected by a broker contained an arbitration clause making the broker arbiter in any dispute between the contracting parties, evidence to charge the broker as personally liable on the contract was inadmissible as being inconsistent with and contradictory of the above clause.

Cases of parol testimony held inadmissible.

Cases of parol testimony held admissible.

Where, however, a memorandum of charter party was expressed to be made between the defendant, as owner of the ship, of the one part, "and Schmaltz and Co. (agents of the freighter) of the other part," and at the end was this memorandum, "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of Schmaltz and Co. shall cease as soon as the cargo is shipped," the Q. B., whilst agreeing with the opinion above expressed in *Rayner v. Grote*, yet held that the plaintiff, who carried on business in the name of Schmaltz and Co., being really principal, might declare as such in an action for not receiving the cargo, and without noticing the memorandum, which was held to apply merely to his character as agent; *Schmaltz v. Avery*, 16 Q. B. 655; see *Carr v. Jackson*, 7 Exch. 382, where it was laid down that a party signing a charter party with a similar memorandum, referring to a foreign principal, might be shown to be the real principal, and was liable to be sued as such; see also *per Williams, J.*, in *Dale v. Humfrey*, E. B. & E. 1020; and *Young v. Schuler*, 11 Q. B. D. 651.

Partners contracting in their own names for themselves and an unnamed partner.

Of course the same principles are in many respects applicable to the case of a partner contracting in his own name, but really on behalf of himself and his unnamed partners; see *Bottomley v. Nuttall*, 5 C. B. N. S. 122. For, to use the words of Parke, B., 9 M. & W. 98, "all questions of this sort between partners are mere illustrations of the same questions between principal and agent." See *Ernest v. Nicholls*, 6 H. L. C. 417; *Cox v. Hickman*, 9 C. B. N. S. 47; *Scarf v. Jardine*, 7 App. Cas. 345. And though, in *Beckham v. Knight*, 4 B. N. C. 243, the C. P. thought that a written contract, *inter partes*, though not under seal, signed by some partners, could not be shown to have been intended to bind others, yet that notion was disapproved of in the Exch. Cham., and the contrary has since been decided in *Beckham v. Drake*, 9 M. & W. 79; 11 Id. 315; 2 H. L. C. 579; see also *Spurr v. Cass*, L. R. 5 Q. B. 656; *Young v. Schuler*, 11 Q. B. D. 651; *Yorkshire Banking Co. v. Beatson*, 5 C. P. D. 109; and the Partnership Act, 1890, ss. 5, 6.

Auctioneer may sue in his own name:

But it is not merely in cases where the agent has contracted in his own name for an unnamed principal, that he has a right to sue at law upon the contract. When he has made a contract in the subject-matter of which he has a special property, he may, even though he contracted for an

avowed principal, sue in his own name. *Williams v. Millington*, 1 H. Bl. 81, is the leading case on this subject. There the plaintiff, an auctioneer, was employed by C. to sell his goods. The sale was at C.'s house; and the goods known to be his property. The plaintiff brought an action against the defendant, who had purchased some part of the goods, for goods sold and delivered, and obtained a verdict, which the court refused to set aside. "An auctioneer," said Lord Loughborough, "has a *possession coupled with an interest* in goods which he is employed to sell, not a bare *custody* like a servant or shopman. There is no difference, whether the sale be on the premises of the owner or at a public auction-room, for, on the premises of the owner, an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a *special property* in him, with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay. . . . It is not a true position that two persons cannot bring separate actions for the same cause: the carrier, and the owner of goods, may each bring actions on a tort; the factor and owner may each have actions on a contract; I am, therefore, upon the whole, decidedly of opinion that this action may well be maintained." See *Davis v. Artingstall*, 49 L. J. Ch. 609, 610; *Wood v. Baxter*, 49 L. T. 45, 47. The buyer may have a corresponding right of action against the auctioneer as a contracting party, *e.g.*, for non-delivery of the goods; *Woolfe v. Horne*, 2 Q. B. D. 355.

and may be
liable as a
contracting
party.

Payment to, or a set-off against, or any agreement with, the employer of the auctioneer is no defence to an action by the auctioneer against the buyer for the price of the goods sold, unless such payment is permitted by the terms of the contract or by facts subsequently accruing, or unless the auctioneer's charges have been paid and it is shown that the employer would not be entitled to recover; *Robinson v. Rutter*, 4 E. & B. 954; *Grice v. Kenrick*, L. R. 5 Q. B. 340.

Payment to
employer of
auctioneer.

Payment to an auctioneer by bill or note does not discharge the buyer from his liability to the employer of the auctioneer, for an auctioneer's authority is to receive payment in cash only; *Williams v. Evans*, L. R. 1 Q. B. 352; *Pape v. Westacott*, (1894) 1 Q. B. 272; and *Hodgens v. Keon*, (1894) 2 Ir. R. 657.

Payment to
auctioneer by
bill or note.

In *Davis v. Danks*, 3 Exch. 435, where an auctioneer was

Action of

trespass by
auctioneer.

put into possession of a house for the purpose of selling the *fixtures*, it was held he could not maintain trespass *de bonis asportatis* against a buyer who wrongfully severed and removed such fixtures, before paying for them; though it was admitted that he could have maintained such an action in the case of *goods* wrongfully removed. In *Consolidated Co. v. Curtis*, (1892) 1 Q. B. 495, Collins, J., held that, if the auctioneer's employer is not the owner of the goods, the real owner can sue the auctioneer, as for a conversion of the goods, if he sells and in the ordinary course delivers them to a buyer. The earlier authorities are collected in this case.

Objection to
auctioneer
suing founded
on the Statute
of Frauds.

There is an objection of a peculiar nature to suing in the name of an auctioneer for the price of the goods; for sales by auction are within the Statute of Frauds, s. 17 (see now the Sale of Goods Act, 1893, s. 4), so that the contract created by such sale must be evidenced by a memorandum in writing signed by the party to be charged, or by his agent. Now, it is well known that the auctioneer is on these occasions the agent for the buyer to sign the contract, as well as of the seller to sell the goods; so that his entry in his book, (if made at the time of the sale, *Mews v. Carr*, 1 H. & N. 484) binds the buyer, and is a sufficient memorandum. But it has been held that, when the buyer is sued in the auctioneer's name, this memorandum is insufficient: for the auctioneer, by bringing the action affirms himself to be the seller, and so causes the case to fall within the rule (affirmed in *Sharman v. Brandt*, L. R. 6 Q. B. 720) that the seller cannot be an agent for the buyer within the statute; *Farebrother v. Simmons*, 5 B. & Ald. 333. It is otherwise, however, if the name be written contemporaneously with the sale, not by the auctioneer, but by his clerk, and the clerk be the bidder's agent to sign; *Bird v. Boulter*, 4 B. & Ad. 443. "Where the bidder, that is the person to be charged, by word or sign authorises the auctioneer's clerk to sign on his behalf he makes him his agent to sign, although by the general custom the auctioneer's clerk would not be the bidder's agent;" *per* Blackburn, J., *Peirce v. Corf*, L. R. 9 Q. B. 210. In that case it was held that there were no special circumstances to show that the clerk had authority to sign. But he very often has such authority; see *Sims v. Landray*, (1894) 2 Ch. 318.

Effect of
signature by
auctioneer's
clerk.

Vendor's
traveller not
agent to sign
for vendee.

The implied agency of an auctioneer to sign for both parties is not extended to other cases, as for instance the traveller who takes an order; *Murphy v. Boese*, L. R. 10 Ex. 126. See further on this point, *ante*, vol. i., p. 322.

A broker has not, like an auctioneer, the above right to sue; *Fairlie v. Fenton*, L. R. 5 Ex. 169. Broker cannot sue.

In every case in which the agent sues in his own name, two consequences, it must be remembered, follow:—1. That the defendant may avail himself of those defences which would be good as against the agent who is the plaintiff on the record; *Gibson v. Winter*, 5 B. & Ad. 96; *Wilkinson v. Lindo*, 7 M. & W. 81; *Bauerman v. Radenius*, 7 T. R. 663; *De Pothonier v. De Mattos*, E. B. & E. 461. 2. That he may avail himself of those which would be good as against the principal for whose use the action is brought; *Welstead v. Levy*, 1 M. & Rob. 138; *Megginson v. Harper*, 4 Tyr. 94; *R. v. Hardwick*, 11 East, 578; *Harrison v. Vallance*, 1 Bing. 45; *Smith v. Lyon*, 3 Camp. 465. Rights of defendant where agent sues.

Where the agent has contracted for an undisclosed principal, and that principal thinks proper to sue on the contract in his own name, he does so, subject to those rights which the defendant might have exercised against the agent at the time of the disclosure, had the agent been really a principal. This is a part of the rule laid down by the court in *Sims v. Bond*, and above quoted (p. 400). Thus, if a factor sell as principal, the buyer, on the true principal afterwards discovering himself, may avail himself of payment to, or set off a demand upon, the factor; on which point see the notes to *George v. Clagett*, ante, p. 135, where the limits to this right are considered. An alleged custom among stockbrokers, that a broker, who has sold for another broker acting for an undisclosed principal, may set off against a claim by the principal a debt due to him from the other broker, is unreasonable and will not bind the principal unless he knew of, and agreed to be bound by, such custom; *Blackburn v. Mason*, 68 L. T. 510; *Crossley v. Magniac*, (1893) 1 Ch. 594. Rights of defendant where undisclosed principal sues.

It was once attempted to extend this doctrine so as to allow a set-off against a trustee of money due from the *cestui que trust*; *Bottomley v. Brook*, 1 T. R. 621; *Rudge v. Birch*, Id. 622. These cases have been disapproved of; *Tucker v. Tucker*, 4 B. & Ad. 745; see per Lord Ellenborough, *Wake v. Tinkler*, 16 East, 36; and they have been considered to be overruled; see *Isberg v. Bowden*, 8 Exch. 852; and *Holmes v. Tutton*, 5 E. & B. 65; but it is not easy to reconcile this with the decisions in *Cochrane v. Green*, 9 C. B. N. S. 448, *Agra Bank v. Leighton*, L. R. 2 Ex. 56, and *Thornton v. Maynard*, L. R. 10 C. P. 695. The dicta, however, in *Cochrane v. Green* have been stated Right of set-off against trustee.

by Jessel, M.R., to be too wide, *Middleton v. Pollock*, 20 Eq. 29. See this point discussed in the notes to *George v. Clagett*, ante, p. 141.

Tendency of decisions as to set-off.

The tendency of the later decisions appears to be to construe the statutes of set-off according to their strict language, and not to extend them to cases not mentioned in them, but within their equity; see *Schofield v. Corbett*, 11 Q. B. 779; *Watts v. Rees*, 9 Exch. 696, 11 Id. 410; *Re Whitehouse & Co.*, 9 Ch. D. 595. The extensive powers which the Judicature Act, 1873, has given to defendants of setting-up counter-claims do not seem to have affected the right of "set-off"; see *Stumore v. Campbell*, (1892) 1 Q. B. 314.

Effect of contract being made on behalf of a foreigner.

A question is sometimes raised as to the legal position of an agent contracting on behalf of a *foreign* principal; and the judgment of Lord Tenterden in *Thomson v. Davenport*, with a *dictum* of Eyre, C.J., in *De Gaillon v. L'Aigle*, 1 B. & P. 368, and other authorities, have been relied upon as showing that, although a party contract expressly as agent, but for a *foreign* principal, he is himself in law the principal. It is conceived, however, that there is no difference *in point of law* between the case of an agent contracting on behalf of an English or foreign principal. In each case it is a question as to the intention of the parties to be collected from the facts (*Heald v. Kenworthy*, 10 Exch. 739, 745, *per* Parke, B.; *Risbourg v. Bruckner*, 3 C. B. N. S. 812, 824, *per* Crowder, J.); and the circumstance of the principal being foreign may be sometimes considered as of great weight in the determination of that question. Thus, on an ordinary sale of goods in this country, it is perhaps not an unreasonable inference *of fact* that the parties residing here are looked to as principals, where there is no stipulation to the contrary; and the usage of the particular trade will probably in many cases furnish a guide to the decision of this question.

Wilson v. Zulueta.

In *Wilson v. Zulueta*, 14 Q. B. 405, where the defendant expressly contracted in writing, "*in behalf and representation of Antonio Parejo, of Havana*," but some of the matters provided for by the agreement were to be done in England, the Q. B. held, on the construction of the agreement, that the agent was personally liable upon it; but in a later case, where a contract was expressed to be made between the plaintiff and Vacher and Tilly, foreigners, and the defendant signed it "for Vacher and Tilly," the Court of C. P. held that the defendant was not liable; *Mahony v. Kekulé*, 14 C. B. 390. Jervis, C.J., in the course of this case observed,

Mahony v. Kekulé.

“In every case of contract it is a question of intention; if that be left in doubt, the circumstance of its being a foreign contract may be looked at; but here the contract is upon the face of it expressed to be made between Vacher and Tilly, and Mahony, and not between the latter and Kekulé. . . . Ordinarily, where an English agent contracts on behalf of a principal residing abroad, the agent is *prima facie* considered to pledge his own credit, because it is highly improbable that the person he is contracting with would give credit to the foreigner.” See the subject discussed incidentally in *Peterson v. Ayre*, 13 C. B. 353; *Green v. Kopke*, 18 Id. 549; 2 Kent’s Commentaries, 631 (a); *Poirier v. Morris*, 2 E. & B. 89; *Lennard v. Robinson*, 5 Id. 125.

In the last case the English agents of a Memel house were held to have rendered themselves personally liable on a charterparty executed by them in this country, and Lord Campbell said, in delivering judgment, “I do not attach much weight to the fact that the alleged principal is a foreigner; for a part of the contract was to be performed at Memel, where he resides, and none in England, where the defendants reside.” And Coleridge, J., said, “My lord attaches no weight to the circumstance of the principal being a foreigner: I confess I cannot quite throw that out of consideration; for it seems to me reasonable that a contracting party should require to have a party to whom he may look, and upon whom he may call for performance. Still, that constitutes only one circumstance to be taken into consideration. I attach much more weight to the terms of the contract.” See also *Risbourg v. Bruckner*, 3 C. B. N. S. 822, *per* Cockburn, C.J.; *Deslandes v. Gregory*, 2 E. & E. 602, 610; and *Wake v. Harrop*, 6 H. & N. 768, 1 H. & C. 202.

*Lennard v.
Robinson.*

The point was considered in three later decisions of the Q. B. In *Armstrong v. Stokes*, L. R. 7 Q. B. 598, the court said, “The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still

*Armstrong v.
Stokes.*

is) a question of fact, but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known, that we are justified in treating it as a matter of law, and saying, that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit."

To this the court expressed their adherence in the two later cases of *Elbinger v. Claye*, L. R. 8 Q. B. 313; and *Hutton v. Bulloch*, Id. 331, 9 Id. 572. In these three cases the question is treated as one of fact, though the presumption is that the foreign principal is not made a party to the contract. See also *Herald v. Connah*, 34 L. T. 885, *per* Bramwell, B.; *Ireland v. Livingstone*, L. R. 5 H. L. p. 408, *per* Blackburn, J.; *Maspons v. Mildred*, in the C. A., 9 Q. B. D. p. 541; *Crossley v. Magniac*, (1893) 1 Ch. 594; and *Malcolm v. Hoyle*, 63 L. J. Q. B. 1, where it was held that the foreign principal was made a party to the contract.

MARRIOT v. HAMPTON.

EASTER.—37 *GEORGE* 3, *K. B.*

[REPORTED 7 T. R. 269 (4 R. R. 439).]

Where money has been paid by the plaintiff to the defendant under the compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received.

THE defendant formerly brought an action against the present plaintiff for goods sold, for which the plaintiff had before paid and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again, and he gave a cognovit for the costs. The plaintiff afterwards found the receipt, and brought this action for money had and received in order to recover back the amount of the sum so wrongfully enforced in payment. But Lord Kenyon was of opinion, at the trial, that after the money had been paid under legal process it could not be recovered back again, however unconscientiously retained by the defendant, though the case of *Moses v. Macferlan*, 2 Burr. 1005, was referred to; and thereupon the plaintiff was nonsuited.

Gibbs now moved to set aside the nonsuit and to grant a new trial: relying on a subsequent case of *Livesay v. Rider*, E. 22 G. 3, B. R., where, on a similar motion, the court held such an action maintainable. And he pressed for the opinion of the court in order that the question might be settled.

LORD KENYON, C.J.—I am afraid of such a precedent. If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person. I cannot, therefore, consent even to grant a rule to show cause, lest it should seem to imply a doubt. It often

happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial; and they are as often refused: but this goes much further.

ASHHURST, J., of the same opinion.

GROSE, J.—It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence. Of the general principle there can be no doubt; and though the last case cited seems to throw some ambiguity upon it, yet some of the positions there stated (*a*) are so entirely repugnant to every principle of law, that I have less difficulty in disregarding the whole authority of it.

LAWRENCE, J.—If the case alluded to be law, it goes the length of establishing this, that every species of evidence, which was omitted by accident to be brought forward at the trial, may still be of avail in a new action to overhale the former judgment; which is too preposterous to be stated.

Rule refused.

(*a*) Which his lordship read from the note of it.

*Interest rei-
publicæ ut sit
finis litium.*

Money paid
under compul-
sion of law :

paid with
knowledge of
facts.

1. Money paid
under com-
pulsion of law.

THE decision in this case is founded on the policy expressed in that well-known maxim, "*Interest rei publicæ ut sit finis litium.*" In order to prevent the confusion which would inevitably arise from allowing either well-considered transactions between parties, who had a sufficient opportunity of inquiring before they acted, or solemn decisions of courts of justice, to be wantonly opened and rediscussed, to the accumulation of expense and litigation, the law (though for a time unsettled by the decision in *Moses v. Macferlan*, 2 Burr. 1005) recognises two general rules which are thus expressed by Patteson, J., in *Cadaval v. Collins*, 4 A. & E. 858, 866 (see *post*, p. 414): "I admit, in general, that *money paid under compulsion of law cannot be recovered back as money had and received*; and further, *where there is bona fides, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back.*"

Under the former branch of the above proposition falls the case reported in the text. Under it also falls *Brown v. M'Kinally*, 1 Esp. 279. In that case M'Kinally agreed with

Brown to sell him all his old iron, except bushel iron, which was of an inferior quality, at 9*l.* per ton. The iron he delivered was mixed with bushel iron; but he nevertheless insisted on the 9*l.*, and brought an action for it. M'Kinally paid the demand, but at the same time said that he did so without prejudice, and meant to bring an action to recover the excess. The present action was brought for that purpose. Lord Kenyon said that "such an action could not be maintained; that to allow it, would be to try every such question twice, for the same legal ground which would entitle the plaintiff to recover in the present action would have been a good defence to an action brought against him by the present defendant; at which time and in which manner he should have proceeded: that money paid by mistake was recoverable in assumpsit, but here it was paid voluntarily, and so could not be recovered under the circumstances of the case."

Brown v.
M'Kinally.

In *Hamlet v. Richardson*, 9 Bing. 644, the same principle was acted upon. That was an action for money had and received to recover cash paid in the course of some transactions arising out of a charterparty, and as the plaintiff alleged, in mistake. It appeared, however, that the payment had been made after letters explicitly calling the plaintiff's attention to the subject had been received by him, and after a writ had actually been issued against him, and an appearance had been entered to it. The jury found a verdict for the plaintiff, and also (which renders this a very strong case) that the payment had been made without knowledge, or reasonable means of knowledge, of the facts on which the demand had proceeded. The court, however, set aside the verdict. "We think," said Tindal, C.J., "this money was paid under compulsion of legal process. In *Marriot v. Hampton* it does not appear to what precise point the action had been carried before the money was paid; though, from the circumstance of a cognovit having been given for the costs, it is probable the declaration had been delivered. But the judgment of the court is expressed in very general terms, namely, 'that, after a recovery by process of law, there must be an end of litigation.' In *Brown v. M'Kinally*, the payment made by the plaintiff in the former action which had been brought against him by the defendant was a payment made after action brought, but in what stage of the action does not appear. Lord Kenyon held the action not maintainable, for that 'to allow it would

Hamlet v.
Richardson.
Money paid
after writ
issued.

be to try every such question twice.' In *Milnes v. Duncan*, 6 B. & C. 679, Holroyd, J., says, 'If the money had been paid *after proceedings had actually commenced*, I should have been of opinion that, inasmuch as there was no fraud in the defendant, it could not be recovered back.' . . . We think the rule of law is accurately laid down by Holroyd, J.; and that, as the money was paid in this case after the suing out of process to recover it, the defendants in the former action knowing the cause for which the writ was sued out before they paid the money, and there being no fraud on the part of the plaintiff in that action, it appears to us that no action is maintainable to recover it back." See, further, *Belcher v. Mills*, 5 Tyr. 715; *Harris v. Lloyd*, 5 M. & W. 432; *Kist v. Atkinson*, 2 Camp. 63; *Gower v. Popkin*, 2 Stark. 85; *Knibbs v. Hall*, 1 Esp. 84; *Skeate v. Beale*, 11 A. & E. 983; *Caird v. Moss*, 33 Ch. D. 22; one of the points in *Fisher v. Samuda*, 1 Camp. 190, proceeded on the same principle.

*Moore v.
Fulham
Vestry.*

Where a summons had been taken out, under the Metropolis Management Acts, to recover a proportion of certain improvement expenses from the plaintiff as a frontager, and the money was paid before the hearing and the summons was thereupon withdrawn, the plaintiff was held not to be entitled to recover the money back as having been paid under a mistake of fact, he not being a frontager; *Moore v. Fulham*, (1895) 1 Q. B. 399. In that case Lord Halsbury said: "The principle of law is, not that money paid under a judgment, but that money paid under the pressure of legal process cannot be recovered."

*Moses v.
Macferlan.*

The case of *Moses v. Macferlan*, which is said at the commencement of this note to have unsettled, for the time, the law on this subject, is reported 2 Burr. 1005. There Macferlan, in breach of a written agreement, sued Moses in the court of conscience, and recovered against him as indorser of a bill. Moses paid the money, and, to recover it back, brought an action for money had and received, which was held to be maintainable. Although the decision itself has been overruled, the judgment of Lord Mansfield contains so elegantly worded a description of the action for money had and received, that it would be scarce pardonable to dismiss the case in which it appears, without extracting it.

Lord Mans-
field, C.J.

"This kind of equitable action," said his lordship, "to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought

to refund. It does not lie for money paid by the plaintiff which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him in any course of law, as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because in all these cases the defendant may retain it with a safe conscience, though, by positive law, he was barred from recovering: *but it lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under those circumstances.*"

The application, however, of the above doctrine to the facts in *Moses v. Macferlan* has frequently been held incorrect. That case was denied to be law by Eyre, C.J., in *Phillips v. Hunter*, 2 H. Bl. 414; and by Heath, J., in *Brisbane v. Dacres*, 5 Taunt. 160; and cannot be now considered as of authority. Equally, or almost equally, obvious to censure is the case of *Cobden v. Kendrick*, 4 T. R. 432 (the point here spoken of being reported in the note). There an action was brought against Cobden by Kendrick for a groundless demand: Cobden paid under a compromise, and then brought an action to recover it back: it was objected that this was to litigate the same claim twice, but Lord Kenyon overruled the objection, saying that it was not paid under the judgment of a court. This case, however, Tindal, C.J., said, in *Hamlet v. Richardson*, 9 Bing. 647, if it can be supported at all, "can only be so on the ground of fraud in the defendant."

Moses v. Macferlan
overruled.

Cobden v. Kendrick
questioned.

For it must be observed that, even since the decisions which have overruled *Moses v. Macferlan*, it has been held open to a defendant who has paid money *under compulsion of law* imposed upon him by the *fraudulent* practices of the plaintiff, to maintain an action to recover back again the money so paid; not indeed that any case has gone so far as to permit proceedings to be thus questioned, which have advanced to the maturity of a judgment; though frequently even a judgment, particularly if signed by virtue of a warrant of attorney or cognovit (which are the subjects of a peculiar branch of the equitable jurisdiction of the courts), has, when fraudulently and improperly obtained, been set aside *on motion*. And in *De Medina v. Grove*, 10 Q. B.

Compulsion of
law imposed
by fraud.

Where
judgment
obtained.

152, 172, it was held that the amount levied under a *fi. fa.* issued upon a judgment fraudulently or improperly obtained, cannot be recovered as money had and received to the use of the party defrauded, so long as such judgment subsists. See also *Huffer v. Allen*, L. R. 2 Ex. 15.

Money paid
under terror
of inceptive
legal pro-
ceedings.

*Cadaval v.
Collins.*

But where, under the terror of inceptive legal proceedings fraudulently directed against him, money has been paid, the party paying has been permitted to recover it *in an action*. An instance of this is presented by the case of *Cadaval v. Collins*, 4 A. & E. 858, in which Don Nuno Alvares Pereira de Mello, Duke de Cadaval, knight of Alcantara and Calatrava, a grandee of Spain, was arrested by Thomas Collins, an insolvent, for a fictitious debt of 10,000*l.*, upon a writ which was afterwards set aside. The Duke, who was ignorant of the English language, in order to obtain his release, agreed to pay 500*l.*, and to give bail for the remainder of the sum; and the 500*l.* was accordingly paid. An action having been brought by the Duke to recover it, the jury found for the plaintiff, and that the defendant knew that he had no claim upon the plaintiff; and the court afterwards discharged a rule for a new trial, or to enter a nonsuit. "It is asserted," said Lord Denman; "that the principle of decision in *Marriot v. Hampton* has not been adhered to in this case. But that case does not warrant the argument drawn from it. It does not decide that money obtained under the compulsion of legal process can *never* be recovered back; but only that, after the defence in an action has failed, and money has been recovered in the action, it cannot be recovered back in another action. This is the ground upon which the decision is put by Lord Kenyon. He says, 'After a recovery by process of law'—not extortion—'there must be an end of litigation.'" It will be observed also, in *Hamlet v. Richardson*, that Tindal, C.J., hints that *Cobden v. Kendrick* might be, perhaps, supported on the ground of *fraud*.

*Pitt v.
Coomes.*

Money paid
to obtain
release from
unlawful
arrest.

Analogous, in some degree, to the case of *Cadaval v. Collins*, is that of *Pitt v. Coomes*, 2 A. & E. 459, which came before the court by way of motion. Pitt had been arrested while privileged as in attendance on the court, and had, in order to obtain his liberty, paid into court, under a judge's order, the amount for which he was sued. The court ordered it to be restored to him. "The arrest," said Lord Denman, "was, we think, illegal. The consequence is, that the money was improperly extorted. In so saying,

I do not mean to suggest that the proceeding was corrupt; but the money, having been the price paid to recover liberty improperly taken away, must be restored." See *Jendwine v. Slade*, 2 Esp. 572; *Atlee v. Backhouse*, 3 M. & W. 633, per Parke, B.; *Unwin v. Leaper*, 1 M. & Gr. 747; and *Wilson v. Ray*, 10 A. & E. 82, where the court overruled *Turner v. Hoole*, D. & R. N. P. 27. It seems, however, that the report of *Turner v. Hoole* is erroneous; see 5 M. & Gr. 402, note (s).

Where the arrest is legal, as where an insolvent in legal custody signs a consent for a judge's order for payment of part of his debt down and the remainder in instalments, though the security is invalid, the money actually paid cannot be recovered back, if it was paid voluntarily, with a full knowledge of the facts; *Viner v. Hawkins*, 9 Exch. 266. In *Brisbane v. Dacres*, 5 Taunt. 156, we find Gibbs, J., saying that he was counsel in *Chatfield v. Paxton*, and that he then, and still, acceded to the doctrine, that money paid with knowledge both of law and fact, but under fear of an arrest, would be recoverable. A special action on the case may also be maintained for the abuse of process for the purpose of extorting property, and in such action it is unnecessary to aver want of probable cause, or that the proceedings are determined; *Grainger v. Hill*, 4 B. N. C. 212.

Action for
abuse of
process.

In *Clark v. Woods*, 2 Exch. 395, a person, who had paid money under pressure of an unlawful warrant of imprisonment, was held to be entitled to recover the whole sum thus extracted from him, although part of this sum was in fact due, and the warrant would have been good if it had been confined to that part.

Where part of
sum paid due.

In *Brisbane v. Dacres*, 5 Taunt. 143, the facts of which are stated below, p. 424, it was thrown out, that money paid with full knowledge of the facts might be recoverable if it were *contra æquum et bonum* that the defendant should retain it. On this reason, it is apprehended, rests the case of *Dew v. Parsons*, 2 B. & Ald. 562, where the Sheriff sued an attorney, for the sum of four shillings and a penny, and the defendant claimed to set off ten and sixpence, which his clerk had paid to the plaintiff on the issuing of three warrants under one writ against three defendants. The clerk paid it on its being claimed by the plaintiff as a right; but, on his mentioning it to the defendant, the latter disapproved of it, and said it was an imposition. Holroyd, J., held that the plaintiff had a right to fourpence only for

Where *contra
æquum et
bonum* that
defendant
should retain
the money.

*Dew v.
Parsons.*

Demands
"colore
officii."

each warrant; and he was consequently nonsuited. On a motion for a new trial, it was urged that the money had been paid with full knowledge of the facts, and therefore, could not be recovered. On the other hand it was contended that the money had been wrongfully exacted under a claim of right, and that it was against good conscience that the plaintiff should retain it. The rule was discharged. And it seems that, when money is paid under an extortionate demand *colore officii*, the payment can never be considered to be voluntary; *Morgan v. Palmer*, 2 B. & C. 729; *Steele v. Williams*, 8 Exch. 625; *Hooper v. Exeter*, 56 L. J. Q. B. 457.

Extortionate
demand by
public officer.

In *Brisbane v. Dacres*, Gibbs, J., mentions that extortion was one of those cases in which money paid might be recovered back; and, indeed, the distinction is plain to common sense, between the case of money paid upon a claim made by a public officer, who is judge in his own cause, and has the power of withholding, by his own mere motion, the ordinary rights of a subject till his demand is complied with, and money paid under a claim made by a private individual, who has no power of enforcing it, except by adopting the ordinary legal remedies. In the former case, it is obviously *contra æquum et bonum* that the public officer should retain what he has acquired by taking undue advantage of his situation: in the latter case, the claimant may have been impressed with a fair belief of his own right, and (if the party making the payment was not deceived) then his retainer of the money when paid is no more *contra æquum*, than his claim of it in the first instance.

Quære as to
Bize v. Dickason,

These considerations render it somewhat difficult to reconcile with sound principle the case of *Bize v. Dickason*, 1 T. R. 285, where there were mutual debts between two persons, and, one of them becoming bankrupt, the other, instead of setting off his own claim, as he might have done, paid the assignees in full; and it was held that he might recover an amount, corresponding to that which he had neglected to set off, in an action for money had and received against the assignees. On this case Gibbs, J., observed in *Brisbane v. Dacres*, that the only question raised in it was, whether the plaintiff would have had a right to deduct the sum he sued for; and it is certainly hard to reconcile it with *Bilbie v. Lumley*, 2 East, 469, mentioned below, p. 421. It has, however, frequently been treated as a case of money received against conscience. Thus, in *Brisbane v. Dacres*,

Mansfield, C.J., said: "In *Bize v. Dickason* the money ought, conscientiously, to have been repaid."

In accordance with the doctrine laid down by Lord Mansfield in *Moses v. Macferlan*, and by Gibbs, J., in *Brisbane v. Dacres*, the courts have in numerous cases held that money obtained by some form of coercion, or extortion, was recoverable back, such extortion presumably rendering it *contra æquum et bonum* that the defendant should retain it.

Thus, in *Ashmole v. Wainwright*, 2 Q. B. 837, it was held that "money had and received" lay against a carrier, who had refused to deliver goods without payment of an exorbitant charge, to recover back the surplus, though there had been no tender of any particular sum; and notwithstanding some expressions to be found in the judgment in *Skeate v. Beale*,

11 A. & E. 983, there seems to be no doubt that money extorted by duress of goods, detainer of deeds, or, in the words of Lord Mansfield, already cited, "by any undue advantage taken of the party's situation contrary to laws made for the protection of persons under those circumstances," can be recovered back in an action for money had and received.

Thus, in *Wakefield v. Newbon*, 6 Q. B. 276, it was held that money paid under protest by a mortgagor, in order to obtain possession of his title deeds, withheld by the mortgagee's attorney upon an unfounded claim of lien, might be recovered back from the attorney as money had and received. To the same effect also is *Smith v. Sleaf*, 12 M. & W. 585. See also *Gibbon v. Gibbon*, 13 C. B. 205; *Oates v. Hudson*, 6 Exch. 346.

In *Parker v. G. W. R. Co.*, 7 M. & Gr. 253, the defendants insisted upon a larger sum for the carriage of the plaintiff's goods than they were authorised to take under their Act. The plaintiff, in order to have his goods carried, paid the excess under protest, and brought an action for money had and received to recover it back. The defendants contended that the money was voluntarily paid with a knowledge of the facts, in pursuance of a contract between the parties; but the court held the action maintainable on the broad ground that the payments "were made in order to induce the company to do that which they were bound to do without them." See also *Parker v. Bristol & Exeter R. Co.*, 6 Exch. 702; *Valpy v. Manley*, 1 C. B. 594; *G. W. R. Co. v. Sutton*, L. R. 4 H. L. 226; *L. & N. W. R. Co. v. Evershed*, 3 App. Cas. 1029; and *British Empire Co. v. Somes*, E. B. & E. 353, 367, 8 H. L. C. 338, where money paid to

Money obtained by various forms of coercion.

Carrier refusing to deliver without exorbitant payment.

Duress of goods.

Title deeds.

Parker v. G. W. R. Co.
Overcharge by carrier.

Somes v. British Empire Co. Dues

paid to release
ship wrong-
fully detained.

Tamvaco v.
Simpson.
Goods de-
tained for
an unfounded
claim for
freight.

a shipwright by a shipowner, in order to obtain possession of a ship wrongfully detained under a claim of lien for the use of the dock during her detention, was recovered as money had and received. In *Tamvaco v. Simpson*, 19 C. B. N. S. 453, L. R. 1 C. P. 363, a shipowner detained the plaintiff's goods at Alexandria on an unfounded claim of lien for freight, whereupon A., at the plaintiff's request, guaranteed to the shipowner payment of the sum claimed by him, and thus obtained delivery of the goods. Afterwards an action was brought at Alexandria against A. on his guarantee, he having at the plaintiff's request refused to pay, and when the litigation had proceeded for some time, A., also at the plaintiff's request, settled the action by paying the whole sum claimed, this payment being, however, made under protest. The plaintiff then repaid A., and brought an action against the shipowner to recover the amount from him, and it was held that he was entitled to recover.

Close v.
Phipps.

In *Close v. Phipps*, 7 M. & Gr. 586, where the attorney of a mortgagee with a power of sale refused to stop the sale, or deliver up the title deeds of the mortgaged property, unless paid an exorbitant demand, it was held that the administratrix of the mortgagor, having paid to the attorney the excess under protest, could recover it back from him as money had and received; although her right to stop the sale was only *equitable*, whilst that of the plaintiff in *Parker v. G. W. R. Co.*, to have his goods carried at the statutable rate, was a strictly *legal* right. See also *Fraser v. Pendlebury*, 31 L. J. C. P. 1, where a mortgagee, having agreed to assign his security on payment of principal, interest, and costs, made a claim for costs to which he was not entitled, and refused to execute the assignment unless this claim was paid. The assignee, by the direction of the mortgagor, thereupon paid the whole sum under protest, and it was held that the mortgagor might recover the excess from the mortgagee in an action for money had and received, not strictly as money paid *under duress*, but as a payment made involuntarily and under undue pressure.

Fraser v.
Pendlebury.

Distinction
in cases of
distress *dam-*
age feasant.

Gulliver v.
Cosens.

A distinction, however, has been drawn in cases of distress *damage feasant*. In *Gulliver v. Cosens*, 1 C. B. 788, where sheep were distrained *damage feasant*, and the owner, in order to get them back, paid an exorbitant demand as for damage done, without tendering a reasonable sum, it was held that he could not recover back the excess in an action for money

had and received, upon the ground, as it seems, that the distrainor was not a wrongdoer in detaining the sheep, it being the duty of the plaintiff, and not of the defendant, to ascertain and tender the proper amount of damage done and even if a tender had been made, the court thought the proper remedy would have been detainment. In *Lindon v. Hooper*, 1 Cowp. 414, a case recognised and acted on in *Gulliver v. Cosens*, Lord Mansfield stated the objection to the action for money had and received under somewhat similar circumstances, to be the surprise upon the defendant, who would have no notice upon the record of the mode in which it was intended to make the receipt of the money wrongful; whether by disputing the right to distrain at all, or insisting upon some informality in the mode of taking the distress. It may be observed, however, that the objection of possible surprise to the defendant would be applicable in many of the cases where the action has been held maintainable, and it may be doubted how far the doctrine of *Lindon v. Hooper* is satisfactory. In *Green v. Duckett*, 11 Q. B. D. 275, the court drew a distinction between private premises and a common pound, and held that money exacted in excess of the fair sum due for damage done could be recovered by the owner who had tendered a reasonable sum after his beast was impounded on the defendant's own premises. The observations of the judges in that case make it doubtful how far the doctrine of *Lindon v. Hooper* and *Gulliver v. Cosens* would be acted on at the present day.

Lindon v. Hooper.
surprise

Quære.

Green v. Duckett.

There is, further, a distinction between an agreement to pay money in order to be liberated from a wrongful arrest, and an agreement to pay money in order to obtain the release of goods improperly detained; which latter is upheld, on the ground that an agreement cannot be avoided by duress of goods; *Skeate v. Beale*, 11 A. & E. 983; but see the observations on this judgment in *Wakefield v. Newbon*, 6 Q. B. 276, 280, *ante*, p. 417. The distinction appears to be, that, although the mere duress of goods will not avoid a contract, a payment of money in order to obtain goods improperly detained is not a voluntary payment, and is therefore recoverable back. See the observation of Parke, B., in *Parker v. Bristol and Exeter R. Co.*, 6 Exch. 702, 705; *Oates v. Hudson*, 6 Exch. 346.

Distinction between agreement made through duress of person, and through duress of goods.

In *Kendal v. Wood*, L. R. 6 Ex. 243, the plaintiff, under a mistake of fact, gave to the defendants bills drawn by his

Kendal v. Wood. Payment of

acceptance to
save credit.

father and accepted by himself for a sum considerably larger than the amount actually due. Before the last acceptance matured the plaintiff discovered his mistake, but nevertheless met the bill under protest, informing the defendants that he did so to save his father's credit. It did not clearly appear whether the bill was in the hands of a third person or not. The court held that the payment made under such circumstances was not voluntary, and that the money could be recovered back. Blackburn, J., said: "I take it that if the bill was in the hands of a third person, which I am inclined to think it was, he had no defence, and he could not help himself. But suppose it was not, I think if a man accepts a bill under those circumstances, and meets and retires it to save the credit of his father and his own, he is quite as much under compulsion and pressure as where, for example, he pays money under protest for goods detained under a mistaken claim of money due for their carriage."

Payment to
procure execu-
tion of compo-
sition deed.
Atkinson v.
Denby.

A remarkable instance of the doctrine that money obtained by extortion is recoverable, is to be found in *Atkinson v. Denby*, 6 H. & N. 778, 7 Id. 934, where the plaintiff, being in embarrassed circumstances, offered a composition to his creditors, and the defendant, who was one of them, refused to receive it unless the plaintiff paid him 50*l.* in addition, and gave him a bill of exchange. The other creditors were waiting to see what the defendant would do with reference to the composition deed. The plaintiff paid the 50*l.* and gave the bill of exchange, and the defendant then executed the composition deed, and many of the other creditors signed subsequently. The plaintiff then brought an action for the 50*l.*, and it was held that he was entitled to recover it in an action for money had and received. In delivering the judgment in the Exch. Cham., Cockburn, C.J., said: "Where the one person can dictate, and the other has no alternative but to submit, it is *coercion*, and in the language of Lord Ellenborough (in *Smith v. Cuff*, 6 M. & S. 165), 'one holds the rod and the other bows to it.' . . . It is said that both parties are *in pari delicto*. It is true that both are *in delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has power to dictate, the other no alternative but to submit." See *Re Lenzberg*, 7 Ch. D. 650; and *ante*, vol. i., p. 385.

It has been held that an over-payment of a water-rate, on demand, to a sanitary authority is not a payment under

compulsion merely because the authority has power, in case of non-payment of the proper rate, to cut off the water supply; *Slater v. Burnley*, 59 L. T. 636; *Slater v. Burnley* (No. 2), 53 J. P. 535. In these cases the authority neither in fact cut off the supply, nor threatened to do so, and the payment was not made under protest to secure a continuance of the supply.

The second branch of the proposition cited at the commencement of this note, from the judgment of Patteson, J., was as follows: "*Where there is bona fides, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back.*" This is in accordance with the maxim of the civil law, which is also that of our own, "*Ignorantia juris excusat neminem, ignorantia facti excusat.*"

Money paid
with know-
ledge of facts.

Thus, in *Bilbie v. Lumley*, 2 East, 469, an underwriter, having paid a loss, sought to recover it back on the ground that a material letter had been concealed. But as he knew of this at the time of the adjustment, it was held that he could not recover. Lord Ellenborough asked the plaintiff's counsel "whether he could state any case where, if a party paid money to another voluntarily with full knowledge of the facts of the case, he could recover it back again, on account of his ignorance of the law." No answer being given, his lordship said that *Chatfield v. Paxton* was the only case he ever heard of, where Lord Kenyon at *nisi prius* intimated something of that sort; but when it was afterwards brought before the court other circumstances were relied on, and it was so doubtful on what ground it turned, that it was not reported. "Every man," his lordship observed, "must be taken to be cognisant of the law, otherwise there is no saying to what extent the excuse of ignorance may not be carried. It would be urged in almost every case."

Bilbie v.
Lumley.

In *Lowry v. Bourdieu*, 2 Dougl. 468, money paid under a mistake of law was endeavoured to be recovered back; and there Buller, J., said, "*Ignorantia juris non excusat.*" With regard to *Chatfield v. Paxton*, mentioned by Lord Ellenborough, a full account of it in its different stages was given by Gibbs, J., who was of counsel in it, in *Brisbane v. Dacres*, 5 Taunt. 155.

The above case of *Bilbie v. Lumley* was recognised in *Lothian v. Henderson*, 3 B. & P. 496, 520, and *Gomery v. Bond*, 3 M. & S. 378. In the latter case the defendant agreed to buy some seed, but, on its being brought to him, would

Gomery v.
Bond.

not accept it; thereupon the plaintiff requested him to sell it for him, which he tried to do; but failing, brought it back again. The plaintiff refused to receive it, and brought this action for the price. The judge submitted to the jury: 1. Whether there was an agreement for sale: 2. Whether the plaintiff had waived it: 3. Whether he had done so in ignorance of his rights; telling them, "that if he did it under an ignorance of the law, and impression that his remedy was gone, it would not amount to a waiver of the benefit of the agreement." The jury having found for the plaintiff, a rule for a new trial was obtained on the authority of *Bilbie v. Lumley*, and was afterwards made absolute.

*Skyring v.
Greenwood.*

Mistaken
allowance in
account.

In *Skyring v. Greenwood*, 4 B. & C. 281, the principle established by *Bilbie v. Lumley* was carried further, and it was held that an allowance in account is equivalent, for this purpose, to the payment of money. In that case, a firm of army agents credited Major S., in a running account, with certain sums which were not really payable to him, and which they did not in fact receive for him. In 1816 they were informed that these sums were not payable to Major S., but did not inform him thereof. In 1821 they delivered to him a statement of account, showing a balance of 116*l.* in his favour, and afterwards asked for repayment of the sums for which they had wrongly given credit. In an action by his administratrix for the balance due at the time of his death, they were not permitted to retain these sums.

"Suppose," said Bayley, J., "that the balance of the account delivered in 1821 had been paid to Major Skyring, and that no subsequent pay had been received for his use by the defendants, and they had brought an action to recover back the money paid. It would have been a good defence to that action to say that the defendants had voluntarily advanced money to the deceased when he asked no credit; and that they had told him that they had received the money for his use; and that on the faith of their representation he had drawn it out of their hands, as his own money, and had been induced to spend it as such." (See in accordance with this view, *Shaw v. Picton*, 4 B. & C. 715.) "And if they could not recover the money back, neither ought they now to be allowed to retain other moneys belonging to the deceased, upon the ground that they have paid or allowed him in account money which they had not in fact received to his use, but which they had suffered him to consider his own for a long period

of time." But see *Dails v. Lloyd*, 12 Q. B. 531, where a defendant was allowed to set off sums paid for the plaintiff, but omitted from accounts furnished to him, although the plaintiff had settled with third parties on the footing of such accounts; and *Newall v. Tomlinson*, L. R. 6 C. P. 405.

In *Cave v. Mills*, 7 H. & N. 913, a surveyor to trustees of turnpike roads returned to them, during several years, accounts showing certain balances as due to himself. These accounts were audited on behalf of the trustees, and allowed, and statements based on them showing the revenue and expenditure of the trust were, according to law, annually published by the trustees, who, believing the accounts to be correct, reduced the mortgage debt of the trust by payments from the money in their hands. Many payments made by the surveyor had, however, in fact, been knowingly omitted from the accounts by him, partly from negligence, and partly to avoid complaint by the trustees, and to keep the apparent expenditure as low as possible. The action was brought by the surveyor to recover these payments from the trustees, and it was held, on the principle acted on in *Shaw v. Picton* and *Skyring v. Greenwood*, that he could not recover them. See also *Holland v. Russell*, 1 B. & S. 424, 4 Id. 14.

A similar point to that in *Skyring v. Greenwood*, *supra*, was decided in *Bramston v. Robins*, 4 Bing. 11. There a landlord, from 1807 to 1822, allowed his tenant larger sums than were really payable on account of land-tax, and gave receipts on that footing. The tenant assigned his tenancy, and the landlord, discovering his mistake, distrained the assignee for the arrears. It was held he had no right to do so. "It is an established principle," said Best, C.J., "that if money be given or paid (*and a settlement in account is the same thing*), with a full knowledge of all circumstances at the time of the payment, it cannot be recovered by the payer."

In *Higgs v. Scott*, 7 C. B. 63, the rule that money paid voluntarily, with a full knowledge of the facts, cannot be recovered back, was fully recognised. There a tenant received notice from his landlord's mortgagee, requiring him to pay the rent to the mortgagee. Notwithstanding this notice, the tenant afterwards paid the rent to his landlord, taking an insufficient indemnity from a person whom he supposed to be the landlord's attorney. It was held that the tenant could not recover from his landlord the amount which he had thus paid, although the mortgagee afterwards

Cave v. Mills

Bramston v. Robins.

Higgs v. Scott.

Payment to mortgagor after notice from mortgagee.

*Platt v.
Bromage.*

Sale by mortgagee with assent of debtor of property not comprised in security.

*Brisbane v.
Dacres.*

compelled him to pay the rent again. So where a mortgagor of chattels assented to the sale by the mortgagee of other chattels also, under the erroneous impression that they passed by the mortgage, and the proceeds were applied in discharge of the mortgage debt, it was held that the proceeds could not be recovered back as money had and received to the use of the mortgagor; *Platt v. Bromage*, 24 L. J. Ex. 63.

In *Bramston v. Robins*, *supra*, the court relied upon the judgment in *Brisbane v. Dacres*, 5 Taunt. 143, which is a celebrated case upon this subject. In that case, the captain of a king's ship brought home treasure for the public in the performance of his duty, and treasure for individuals for his own emolument. He received freight for both, and paid one-third of it, according to an usage then established in the navy, to his admiral. He afterwards discovered that he was not bound by law to pay any part to the admiral, and thereupon brought this action to recover the payment. The court held that he had acted illegally in conveying home the private treasure for his own benefit without the orders of some competent authority, and could therefore found no claim on such a transaction: and that, with regard to the public treasure, the third, having been paid over to the admiral, with full knowledge of the facts, could not now be recovered, since the admiral, having received it in accordance with the usage of the profession, might conscientiously retain it. Heath, J., said this was a stronger case than *Marriot v. Hampton*; for that was "*judicium redditum in invitum*," whereas here "the plaintiff is a judge in his own cause, and decides against himself, and he cannot be heard to repeal his own judgment. Lord Eldon, in *Bromley v. Holland*, 7 Ves. 23, approves Lord Kenyon's doctrine, and calls it a 'sound principle, that a payment voluntarily made is not to be recovered back.'" See also *Barber v. Pott*, 4 H. & N. 759, and *Remfry v. Butler*, E. B. & E. 887.

Heath, J.

Payment under mistake of fact.

*Milnes v.
Duncan.*

But though a payment made with knowledge of the facts cannot be recovered back because made in ignorance of law, it is different where the payment was made under a mistake of facts. In *Milnes v. Duncan*, 6 B. & C. 671, the plaintiff, who was employed by the defendant to collect his rents, having received more than 150*l.*, sent him on account thereof a bill for 150*l.* which had several indorsements, but bore nothing on its face which showed it to have been drawn or indorsed in Ireland. The bill was dishonoured, and the defendant overheld it so long as to discharge all the previous

parties. He nevertheless called on the plaintiff to pay the amount of the bill, alleging that it was a nullity, being impressed with only a four-shilling stamp. The plaintiff directed his agent to examine it, and, being satisfied that it really bore that stamp, paid the amount of it to the defendant. Afterwards, on discovering that the bill had been drawn in Ireland, and bore the proper stamp for a bill of that amount drawn in Ireland, he brought this action to recover back the amount. The court held that he was entitled to recover. "There is no doubt," said Bayley, J., "as to the rule of law applicable to this case. If a party pay money *under a mistake of the law* he cannot recover it back. But if he pay money *under a mistake of the real facts*, and no laches are imputable to him in respect of his omitting to avail himself of the means of knowledge within his power, he may recover back such money. . . . It seems to me that the plaintiff, at the time when he made the payment, had no adequate means of knowing that the bill was not a void bill; and that being so, it is quite clear that this money was paid under a mistake of fact, and without any laches on the part of the plaintiff, and for these reasons I think he is entitled to recover it back." (As to laches, however, see *post*, pp. 427, 428).

Where a sheriff assigned to an execution creditor who had, although the sheriff was not aware of the fact, notice of an act of bankruptcy committed by the execution debtor, and the assignees under the bankruptcy afterwards compelled the sheriff to pay them the value of the goods, it was held that the sheriff might recover the amount from the execution creditor as money had and received to his use, although in fact no money had passed between the plaintiff and the defendant; *Standish v. Ross*, 3 Exch. 527.

Standish v. Ross. Assignment by sheriff to creditor who had notice of act of bankruptcy.

But where, upon the settlement of an account between plaintiff and defendant, the latter claimed a deduction for a payment alleged to have been made by him for the plaintiff, and the claim was by mistake allowed, and the balance struck and accepted by plaintiff on the footing of such deduction: it was held that an action for money had and received would not lie to recover the amount so allowed; *Lee v. Merrett*, 8 Q. B. 820. This decision, however, so far as it proceeded on the principle that money had and received will not lie where money has not been actually *paid*, but only allowed in account, has not been approved of, or acted upon in the later cases; see *Lucas v. Jones*, 5 Q. B. 949; *Standish*

Mistake in settlement of account. *Lee v. Merrett*.

Questioned in later cases.

Payment
under "blind
suspicion"
of facts.

Lucas v.
Worswick.

Mistake
through
forgetting
facts.

Dicta in
that case
considered.

v. Ross, 3 Exch. 527; *Gingell v. Perkins*, 4 Id. 720, 726, *per Parke, B.*; see also *Ehrensperger v. Anderson*, 3 Id. 148.

In *Chatfield v. Paxton*, 2 East, 471, Ashhurst, J., said that, "where a payment has been made, not with full knowledge of the facts, but only *under a blind suspicion of the case*, and it is found to have been paid unjustly, the party paying may recover it back again." The case of *Lucas v. Worswick*, 1 M. & Rob. 293, advanced that doctrine still further. There the defendant, having a claim for work against the plaintiffs, amounting, as he insisted, to 142*l.*, but, as they insisted, only to 97*l.*, requested 20*l.* on account, which was paid him by Lucas, one of the plaintiffs. He afterwards met Lucas, and agreed to give up the disputed item, on which Lucas paid him 97*l.*, but almost immediately after sent him notice that he had forgotten, when he did so, that he had previously paid him 20*l.*, which he therefore requested him to return. On his refusal, the action was brought to recover it. The defendant submitted that the money, having been paid by Lucas voluntarily, and with knowledge of all the facts, could not be recovered. The point was reserved, and the plaintiffs had a verdict subject to it. The case was afterwards fully discussed before Lord Denman and Bolland, B., who said, "that as the jury had in effect found that the money was paid by mistake in the hurry of business, they were of opinion that it might be recovered back as money had and received to the use of the plaintiffs."

The *dicta* in this case certainly go far. The money paid by Lucas to the defendant could not have been paid under any mistake of law, and therefore, if paid by mistake at all, it must have been under a mistake of fact. But whether it be consistent with sound policy to allow a person who has had the very fullest means of knowing all the facts to allege that he was hurried, and that he has forgotten them, appears extremely questionable. The truth or untruth of such an excuse may be the subject of probable guess to others, but can be *known* only to the party making it, and its admission seems to afford great facilities to parties wishing to rip up and litigate transactions which have turned out less advantageous to them than they once expected. Can it be said that such a person has been guilty of no laches? a question which in *Milnes v. Duncan* was considered material. Nor does it seem absolutely necessary to establish such a doctrine in order to support *Lucas v. Worswick*, for it seems obvious that the conduct of the defendant was tainted with fraud,

and if so, he could not, of course, be permitted to retain moneys entrapped by circumvention and dishonesty. It has, however, been decided, in *Kelly v. Solari*, 9 M. & W. 54, that money paid in ignorance of facts by a person who once had full knowledge of, but has forgotten them, may be recovered. "The position," said Parke, B., "that a party so paying is precluded from recovering by laches in not availing himself of the means of knowledge in his power, seems to have been founded on the *dictum* of Bayley, J., in *Milnes v. Duncan* (*ante*, p. 425), and, with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."

Opinion of Bayley, J., in *Milnes v. Duncan* questioned in *Kelly v. Solari*.

As the opinion of Bayley, J., was questioned in the above judgment, so it seems to have been overruled by *Bell v. Gardiner*, 4 M. & Gr. 11, where a person, who had given a note for a demand from which he had full means of knowing that he was discharged, was held to have a good defence to an action brought upon it. "We can, in fact," said Tindal, C.J., in that case, "regard the possession of the means of knowledge only as affording a strong observation to the jury to induce them to believe that the party had actual knowledge of the circumstances, but there is no conclusive rule of law, that because a party has the means of knowledge he has the knowledge itself." This passage was cited with approval by Lord Blackburn, in *Brownlie v. Campbell*, 5 App. Cas. 925, 952. See also *Mather v. Maidstone*, 18 C. B. 273; *Gurney v. Womersley*, 4 E. & B. 133; and *London & R. P. Bank v. Liverpool Bank*, (1896) 1 Q. B. 7. The mere fact that the person who paid the money had at the time of payment means of knowledge of which he neglected to avail himself, will not disentitle him to recover the money back, if it was paid under a real mistake; *Townsend v. Crowdy*, 8 C. B. N. S. 477.

Overruled in *Bell v. Gardiner*. Means of knowledge merely evidence of actual knowledge.

In this case an agreement was made between A. and B., that A. should buy B.'s share in a partnership for a certain

Townsend v. Crowdy.

Williams, J.

M stake must
be as to fact
which, if true,
would create
actual
liability.

*Aiken v.
Short.*

sum, payable by instalments, and that, if the profits of the business for three years should not amount to a particular sum, a deduction should be made from these payments. A. made a partial investigation of the accounts, and believing that the profits had reached the fixed amount, paid the last of the instalments. Six months afterwards the accounts were gone into more fully, and A. then discovered, for the first time, that the profits had been considerably overestimated. There had been no concealment or fraud with reference to the accounts, which had been fairly laid before A. Under these circumstances, the court was of opinion that A. was entitled to recover from B. the deduction which he would have been entitled to make under the agreement, had he known the facts in the first instance. "No doubt," said Williams, J., in delivering judgment, "at one time the rule, that money paid under a mistake of fact might be recovered back, was subject to the limitation that it must be shown that the party seeking to recover it back had been guilty of no laches. But since *Kelly v. Solari* it has been established that it is not enough that the party had the means of learning the truth, if he had chosen to make inquiry. *The only limitation now is, that he must not waive all inquiry.*"

The mistake of fact which is sufficient to enable a person who has paid money to recover it back must be, it seems, a mistake as to a fact, which, if true, would have rendered him *liable to pay* the money, and not merely as to a fact which, if true, would have rendered it desirable that he should pay it; see *per* Bramwell, B., *Aiken v. Short*, 1 H. & N. 210, 215. There the plaintiff, an executrix, being entitled to money lent by her testator, and secured by a bond, and by an equitable mortgage of an interest under a will of E. C., applied to the debtor for payment, and was referred by him to a bank which had purchased his supposed interest under the will, subject to the charges on it. The bank paid the money to the plaintiff, and afterwards it appeared that E. C. had made a later will, which had been suppressed by the family, and under which the debtor did not take the property given to him by the first will. Upon these facts, the court held that the bank could not recover the money back as money paid under a mistake of facts, the money which had been paid having been in fact due to the plaintiff, although it would not have been paid by the bank if all the facts had been known to them.

And the mistake must be one as between the person

paying and the person receiving the money, and as to some fact affecting the right of the payee to receive the money. In the words of Williams, J., in *Chambers v. Miller*, 13 C. B. N. S. 125, "you cannot recover back money because you have paid it in ignorance of some fact, which, had you known it, would have influenced you not to pay it; that fact being one with which the payee has nothing to do." In such cases there is obviously nothing *contra æquum et bonum* in a payee to whom the money was due retaining it as against a plaintiff, who, it may be, would have withheld payment had certain facts been present to his memory. In *Chambers v. Miller* money was handed over by the cashier of a bank to the holder of a cheque drawn upon the bank, and it was held that this transfer was complete, and could not be revoked upon the discovery by the bankers (whilst the holder of the cheque was still counting the money) that the customer had overdrawn his account. See also *Pollard v. Bank of England*, L. R. 6 Q. B. 623.

Mistake must be as between payer and payee.

Chambers v. Miller.

In *Barber v. Brown*, 1 C. B. N. S. 121, it was held that money which had been paid as rent under a mistaken belief that a lease for lives was still in force, and therefore that an under-tenancy continued, was recoverable. The plaintiff had been tenant to T., who had been under-lessee of a person who had himself an original lease of premises (including those which had been occupied by the plaintiff) expiring in 1854. The under-lease to T. had been granted upon lives, and in 1851 the last of the *cestui qui vies* had died. The plaintiff, not being aware that all the *cestui qui vies* were dead, had gone on after 1851, and up to the expiration of the original lease in 1854, paying rent to the representatives of the under-lessee, T. It was held that the plaintiff was, upon these facts, entitled to recover the sums so paid by him under a mistaken belief that the right to receive them had not ceased. "We think," said the court, "that this is not an action to try a disputed title to land; there is no dispute on the subject; it is a simple case of money paid after the title of the (under-lessee) expired, the fact of its having so expired not being in any manner disputed."

Barber v. Brown.

Rent paid under mistaken belief that lease still in existence.

In *Wilson v. Ray*, 10 A. & E. 82, a creditor, who had insisted on security as the condition of his agreeing to a composition, received the amount of such security, and it was held that having been paid voluntarily, and with full knowledge of the facts, it was not recoverable; see also

Wilson v. Ray. Payment to creditor stipulating for security as consideration

for accepting
composition.

Viner v. Hawkins, 9 Exch. 266, *ante*, p. 415. But it must be observed that in *Wilson v. Ray* the bill of exchange was voluntarily paid to the creditor after it became due, and after he had signed the deed of composition. This appears to be the distinction between this case and the later case of *Atkinson v. Denby*, *supra*, p. 420. An attempt was made to question *Wilson v. Ray* in *Gibson v. Bruce*, 5 M. & Gr. 401; but it seems to accord in principle with those cases which establish that neglect to set up a defence at the proper time is irremediable. Thus, if one discharged under the old Insolvent Act, 1 & 2 Vict. c. 110 (s. 92 whereof invalidated securities for scheduled debts), gave a warrant of attorney for such debt without action, the court would have set aside the warrant of attorney and judgment signed thereon; *Ex p. Hart*, 2 D. & L. 778; but if he suffered judgment to go against him by default in an adverse action wherein he might have pleaded the defence, the court would not have interfered; *Philpot v. Aslett*, 1 C. M. & R. 85; *Denne v. Knott*, 7 M. & W. 143; *Lane v. Chapman*, 11 A. & E. 966; see also *Bradshaw v. Bradshaw*, 9 M. & W. 29. The case of *Smith v. Bromley* and the other authorities cited in the note to *Merryweather v. Nixan*, *ante*, vol. i., p. 385, in which money paid contrary to a rule of law for the protection of one class against another has been held recoverable, may be referred to on this question.

Rule in
equity.

“In equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn” as at law; *Daniell v. Sinclair*, 6 App. Cas. 181; but a court of equity has “power to relieve against mistakes in law, as well as against mistakes in fact; that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it;” *Stone v. Godfrey*, 5 De G. M. & G. 76, 90, *per* Turner, L.J.; *Rogers v. Ingham*, 3 Ch. D. 351, *per* Mellish, L.J. “But relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties;” *Rogers v. Ingham*, *supra*, *per* James, L.J.; *Mid. G. W. R. of Ireland v. Johnson*, 6 H. L. C. 798.

In *Daniell v. Sinclair*, *supra*, a settled account was reopened where compound interest had been charged, owing to both parties having misunderstood the effect of a mort-

gage deed. Where money has been paid, under a mistake of law, to an officer of the court, such as a trustee in bankruptcy, or a liquidator, the court will order its officer to refund the money so paid; *Ex p. James*, 9 Ch. 609; *Ex p. Simmonds*, 16 Q. B. D. 308; *Re Brown*, 32 Ch. D. 597; *Re Opera, Ltd.*, (1891) 2 Ch. 154.

Money paid, by mistake of law, to officer of court.

It is important to observe that, where an agent has been induced by fraud to hand over money intrusted to him by his principal for a special purpose, the action for money had and received may be brought in the name of the agent; *Stevenson v. Mortimer*, 2 Cowp. 805; Story on Agency, s. 398; and *Holt v. Ely*, 1 E. & B. 795. It may likewise be brought in the agent's name, in cases where the agent has under a mistake of fact paid his principal's money to A. instead of to B., to whom he was directed to pay it; *Colonial Bank v. Exchange Bank*, 11 App. Cas. 84. In the case of money paid by mistake to an agent, and paid by him to his principal without notice of the claim, the action must be brought against the principal; *Shand v. Grant*, 15 C. B. N. S. 324; *Holland v. Russell*, 4 B. & S. 14; *Owen v. Cronk*, (1895) 1 Q. B. 265; see *Ellis v. Goulton*, (1893) 1 Q. B. 350; unless the agent dealt as a principal with the person who paid him; *Newall v. Tomlinson*, L. R. 6 C. P. 405. In the case of money paid by mistake to a trustee, the action must be brought against the trustee, although he has paid the money to the beneficiary; *King v. Stewart*, 66 L. T. 339.

Action by agent.

Action against agent.

Trustee.

Upon the whole, then, it is clear—

1. That money obtained by compulsion of law, *bonâ fide*, and without taking an undue advantage of the situation of the party paying it, is not recoverable.

Summary.

2. That money paid with full knowledge of the facts is not recoverable, if there be nothing unconscientious in the retaining of it.

3. That money paid in ignorance of the facts is recoverable notwithstanding laches, provided that the party paying it has not waived all inquiry. Laches, in the sense of a mere omission to take advantage of means of knowledge within the reach of the person paying the money, is not sufficient to disentitle him to recover it back; *Kelly v. Solari*, 9 M. & W. 54; *Townsend v. Crowdy*, 8 C. B. N. S. 477.

It may also be laid down as a rule usually applicable to this action, that the person who received the money must not, through the neglect or misconduct of the person who

Restitutio in integrum.

has paid it, be placed in a worse position than if it had not been paid; *Cocks v. Masterman*, 9 B. & C. 902; see also *Clarke v. Dickson*, E. B. & E. 148; *Freeman v. Jeffries*, L. R. 4 Ex. 189 (which see as to the necessity of a prior demand by the person seeking to reopen a transaction). But where there has been no neglect or misconduct on the plaintiff's part, the mere fact that the defendant cannot be restored to the *status quo*, for instance, where he has "applied the money in the meantime to some purchase which he otherwise would not have made," is no defence; see *Standish v. Ross*, 3 Exch. 527, 534; and *Colonial Bank v. Exchange Bank*, 11 App. Cas. 84. In *Durrant v. Ecclesiastical Commissioners*, 6 Q. B. D. 234, it was held that the plaintiff, who had by mistake paid tithe rent charge for lands not in his occupation, could recover back the amount from the defendants, though at the time when the plaintiff discovered his mistake the remedy of the defendants against the lands actually chargeable had become statute barred.

The application of these rules will be seen in the decisions brought together in the above note.

A branch of the doctrine established in *Marriot v. Hampton* is to be found in those cases, where it was held that a payment made by a bankrupt under compulsion of law was valid against his assignees; see *Reynolds v. Wedd*, 4 B. N. C. 694, where most of the previous authorities were cited; and also *Follett v. Hoppe*, 5 C. B. 226.

MANBY AND ANOTHER v. SCOTT.

MICHAELMAS.—12 CAR. 2, K. B.

[REPORTED 1 LEVINZ, 4.]

Whether the wife's contract shall bind the husband or not.

IN *assumpsit*, on issue *non-assumpsit*, a special verdict at Guildhall, before Mallet, Justice, found that Scott's wife departed from him without his consent, and lived twelve years separate from him, and then returned ; but he then would not receive her nor allow her any maintenance, and discharged or forbade tradesmen, particularly the plaintiffs, from trusting her with any wares : and that the plaintiffs, being mercers, sold to the wife wares to the value of 40*l.*, and that the prices were reasonable, and the things fit for her quality ; and, if the husband was obliged to pay for them, they found for the plaintiff, and if not for the defendant.

This case was argued at the bar three several terms, first by Alleyn, for the plaintiff, and Wylde, for the defendant ; secondly, by Finch, for the plaintiff, and Serjt. Beare, for the defendant : and thirdly, by Jones, for the plaintiff, and Serjt. Baldwin, for the defendant, and afterwards by all the judges at the bench, *viz.*, Foster, Chief Justice, Mallet, Twysden, Wyndham ; and the whole court agreed that the verdict was sufficient, though it did not find what the goods were ; for, although what are fit and necessary is to be tried by the court, yet it is that court by which the case is tried, and not the court here before which it comes to be adjudged on the special verdict : and that these goods were fit for her quality is agreed by both the jury and the court where the cause was tried. But whether the husband should be charged, the court was divided in opinion. TWYSDEN and MALLET held that he should be charged ; for, when she returned to her husband and he would not receive her, nor provide a maintenance for her, if nobody would trust her so as to charge the husband, she must

starve, for she cannot earn her living by her labour, for whatever she gains by her labour the husband shall have ; and therefore of necessity she must be trusted, and the things being necessary for her living the husband ought to be charged for them ; and the husband's prohibiting the plaintiffs to trust her cannot deprive her of the liberty which the law gives her for preservation of her life ; for the law of necessity dispenses with things which otherwise are not lawful to be done, as to throw down my neighbour's house for preventing the spreading of fire, to throw goods out of a boat when it is overladen, and the like ; and they agreed the case put by Fineux, 21 H. 7, 40, that the wife cannot provide bread for the family so as to charge the husband : but here the provision is necessary for the maintenance of her own life ; and though alimony be recoverable in the spiritual court, yet if the husband be obstinate, and will not obey their sentence, how shall the woman live ? And if he will obey it, yet how shall she live in the meantime ? And as to the cases cited at the bar of writs to the sheriff, for delivering to the wife reasonable estovers, those were in time of H. 3, and have been long time disused. And TWYSDEN, Justice, held that in this case the plaintiffs might have trover against the husband for the goods, if the contract be void ; which all the others denied, the goods being delivered by the plaintiff and he not to re-have them ; and the said two judges held that, as the husband shall be bound in trespass for a trespass done by the wife, or in trover for goods taken by the wife, so he shall be here for goods sold to her for relief of her necessity ; and to maintain the opinion for the plaintiffs, were cited 20 H. 6 ; 26 Dyer, 234 ; 11 H. 6, 30. Also 10 Co. 58, *Bishop of Salisbury's Case*, that a bishop may grant an office of necessity notwithstanding the statute. And 9 Co. 73, a feme covert excused in a ravishment of ward for necessity, because she has nothing to pay ; and it is no disadvantage to the husband, for he is charged only for necessaries, and those he must have provided if the wife had continued with him, and divers other matters were said, and divers other authorities cited on this side.

But of the contrary opinion were FOSTER and WYNDHAM, and on this part it was argued that the husband shall not be charged : for when she departs from her husband against his will, and remains so long absent, and returns again at her own pleasure,

the husband shall not be obliged to maintain her after her return, any more than when she was absent; for, if it were so, wives might leave their husbands in their youth, and return in their old age, when they cannot be so assisting to their husbands as before, and their society, assistance, and comfort to their husbands is one consideration of their maintenance; *a feme covert cannot make any contract to charge her husband without his assent, precedent or subsequent, expressed or implied*; they did not deny but that, as circumstances may be, an express or implied assent of the husband may appear to a jury, so that the contract of a wife may be the contract of the husband; as if the goods come to his house, or he appears well content with the use of them; but here the contrary appears, for the plaintiffs were forbid by him to sell to or trust his wife, and it does not appear that he ever had knowledge of this sale, and so could not approve thereof; and the jury having found only the forbidding and the sale, the court is obliged to adjudge, according to the law, that the contract is void, for a feme covert has not power of herself to make any contract: and it is not like to the case of infants, for their contracts are to some intents good, and may be made good by them at their age; but the contracts of feme coverts are absolutely void, for they have not any power or will, but are subject to the will of their husbands: every man may trade with what tradesman he will, exclusive of all others; but by this means they shall be forced against their will to trade with such as their wives please. And the laws of England have provided for wives more reasonably than to make them their own carvers; (*viz.*) to go to the ordinary for alimony, the costs of which suit the husband shall pay, if the wife hath just cause of complaint, Cro. Car. 16, *Green's Case*; and to supply it in case of the husband's obstinacy, 8 H. 3, Rot. Claus. Memb. 19 Vel. 39, *Fretchinfeld's Case*, and 4 H. 3, Rot. Claus. Memb. 3, where the husband was obstinate, writs *de estov. habend.* were directed to the sheriff to levy estovers (*i.e.* maintenance) for the wife, of the husband's goods, which cases, though ancient, are still law, although the law has now provided another remedy against the obstinacy of the husband by *excom. capiendo*. And in maintenance of the opinions on this side were cited 21 H. 7, 40, that she cannot charge her husband for victuals bought for the family without his command precedent, or assent subsequent:

F. N. B. 120, G., the contract of the wife shall not charge her husband any more than the contract of the servant : 4 Co. 60, *Forse* and *Hembling's Case*, she can neither make a will, nor revoke a will made before marriage, because she has no will, and therefore the marriage is a revocation, for else the will would be irrevocable : Cro. Jac. (617), *Tracey v. Dutton*, her receipt after marriage of the rent of her own land shall be no discharge against the husband, although the tenant had no notice of the marriage : 31 E. 1, Tit. Debt, 663, and 3 ; 20 H. 6, 22 ; 27 H. 8, 24, 25 ; 13 R. 2, Tit. Annuity, 50. And those judges held the prohibition by the husband to be material.

But the court being thus divided, the cause, for the great weight thereof, was adjourned into the Exchequer ; and there, after divers arguments at the bar, it was solemnly argued by all the judges severally at several days at the bench, where TYRRELL, Justice of Com. Banc., joined in opinion with TWYSDEN and MALLET ; all the rest, viz., BRIDGMAN, Chief Justice of Com. Banc.—HALE, Chief Baron of the Exchequer—HIDE and BROWN, Justices of Com. Banc., and ATKYNS and TURNER, Barons of the Exchequer, and FOSTER, Chief Justice, and WADHAM WYNDHAM, Justice of the King's Bench, agreed that the husband should not be charged, but that judgment ought to be given for the defendant : and so it afterwards was, on a motion in *Banco Regis*, and the judgment was there entered in Easter Term, 15 Car. 2.

MANBY v. SCOTT.

IN THE EXCHEQUER CHAMBER.

By Adjournment.

[REPORTED 1 SIDERFIN, 109, AND TRANSLATED FROM THE ORIGINAL FRENCH BY
JOHN GEORGE PHILLIMORE, ESQ.]

IN an action on the case in *assumpsit*, the case on a special verdict found in London was to this effect; Dame Scott, wife of the defendant, Sir Edward Scott, left her husband against his will, and after a time she made demand of cohabitation with her husband, but he refused to receive her. And during the time she was thus absent from her husband he prohibited several people from supplying her with goods or wares of any kind, and, if they should be supplied, declared that he would not pay for them, and, among others, he specially prohibited the plaintiff, who nevertheless sold the said dame yards of silk and velvet to the amount of 40*l.* (for which this action was brought), which the jury found were necessaries suitable to the degree of her husband; and whether this be an *assumpsit*, they pray the advice of the court.

This case was often argued in the King's Bench, and the opinions of the Judges there were divided; FOSTER, Chief Justice, and WYNDHAM, puisne judge, giving their judgment for the defendant; and MALLET and TWYSDEN, justices, giving their judgment for the plaintiff. And as the court was divided, the case was adjourned to the Exchequer Chamber, before all the judges of England; and afterwards it was argued at *the bar*, and afterwards in Michaelmas, Hilary, and Easter Terms (14 & 15 C. 2, A.D. 1662, 1663), judgment was pronounced by all the justices of K. B. and C. P. and the Barons of the Exchequer, many of whom prefaced their arguments by observing,

I. The general importance of this case: and also,

II. The dearth of authorities relating to the subject in our books.

I. As to the general importance of the case, it was observed

that in no case pleaded before in this court were a larger portion of mankind concerned; for the judgment delivered in it concerned the two sexes—that is, so many of each as are married or will be married (a). Nor could such interest be nearer or more direct,

(a) Note by J. G. Phillimore, Esq.—The later Roman law relating to the subject discussed in the text, will be found in the Code, Lib. 4, Tit. 12, and in Voet's Commentary on the Pandects, Lib. 23, Tit. 2, 44. It will not perhaps be considered impertinent in this place to observe that women, during the early period of the Roman History, were not only excluded from all public transactions, but that their domestic activity was confined within very narrow limits. "*Majores nostri nullam ne privatam quidem rem agere fœminas sine auctore voluerunt, sed in manu esse parentum fratrum vivorum.*"—Liv. Hist. Lib. 34, c. 2.

Thus women could not be witnesses to a will; not, as has been said, from the presumed imbecility of the sex (though a passage in Plutarch's life of Publicola might seem to fortify such an opinion), but because they could not share in the public solemnities of its ratification. *Comitiis interesse non potuerunt.* The same spirit of jealousy and caution may be traced in the law which inflicted an equal punishment upon a woman who drank wine (a crime which, as Dionysius Hal., who has preserved the Law, Ant. Rom. 2-25, remarks, and as many passages in Aristophanes prove, was considered by the Greeks as eminently venial in that sex) and upon an adulteress. This severity fell, however, into disuse, and was succeeded by that laxity of conduct and disregard of restraint among the Roman ladies, with which every reader of Juvenal is familiar. Tertullian ad Gentes says, "*Circa fœminas quidem illa majorum instituta ceciderunt quæ modestiæ quæ sobrietati patrocinebantur;....cum mulieres usque adeo vino abstinerent ut matronam ob resignatos cellæ vinariæ loculos sui inediâ necârint. Sub Romulo vero quæ vinum attigerat impune a marito trucidata sit. Idcirco et oscula propinquis offerre necessitatis erat ut spiritu judicaretur.*"—Cap. 6.

It was for the purpose of imposing

some check upon the habit of mingling in all transactions, which had become inveterate among the sex, that the *Senatus Consultum Velleianum* was enacted, by which women were forbidden to become bound for others: "*ne pro ullo fœminæ intercederent.*"—Dig., Lib. 16, Tit. 1; Heineccius, Ant. Rom., Lib. 3, Tit. 21.

During the Republic, marriages were divided by the Roman Law into two kinds—the *matrimonium justum*, and the *matrimonium injustum*. The *justum matrimonium* was twofold—*cum*, or *sine*, in *manum conventionem*. (Cic. Top. 3.) "*Genus est uxor, ejus duæ formæ, una matrum familias quæ in manum conveniunt, altera earum quæ tantummodo uxores habentur.*" The *in manum conventio* might be effected in three ways—*usu*, *farreo*, *coemptione* (Gaius I., 110). The relation of the wife to the husband, under the *I. M. C.*, was that of a ward to a guardian, and of a child to a parent. Terence, whose plays furnish the happiest illustrations of Roman law, thus describes it. "*Te isti virum domicum, tutorem, patrem.*" Hence Heineccius thinks the husband possessed the power of life and death over his wife, as over his children; that he might summon her in case of misconduct before a domestic forum, and inflict any punishment sanctioned by its authority upon her, is unquestionable. (Tac. Ann. 13, 32.) "*Is (Plautius) prisco instituto, propinquis coram, de capite et famâ conjugis cognovit et insontem nuntiavit.*" Pliny (Hist. 14, 14) tells of a matron "*suâ inediâ mori coactam.*" He might dispose of her, if the *coemptio* had been adopted, by a ceremony called "*remancipatio*" (Festus sub voce *Remancipata*), as Cato did of Marcia (Plut. in Cat. c. 25), and Tiberius Nero of Livia: *ἔξεδωκε δὲ αὐτὴν αὐτὸς ὁ ἀνὴρ ὥσπερ τὴν πατὴρ*. He might also bequeath to his wife "*optionem tutorum*," the privilege of choosing her own guardian (G. I. 150); "*Titiae uxori meæ optionem tutoris do.*"

since it related to the acts of wives, who are, by the law of this country and the law of God, accounted identical with their husbands; and HALE, C. B., said that the case was not, in itself, of general consequence, inasmuch as it consists of its own

See a remarkable passage, Livy 39, 18. Where the husband had omitted to appoint a guardian, the wife, by the law of the twelve tables, was placed under the care of his nearest male relation. In order to escape from the rigour of this law, which was often abused, and which was finally abolished by Claudius (Gaius, I. 171), the wife contracted a pretended marriage, and her fictitious husband sold her to a third person, the tutor fiduciarius, by whom she was immediately emancipated (Gaius, I. 114). This was soon considered as a merely formal proceeding, for the prætor (like our chancellor when uses were first invented) compelled the tutor to execute his trust. To this proceeding Cicero has alluded, *Pro Muræna*, 12. It is curious, and not uninteresting, to observe how certainly a law, when it has survived the feelings and manners from which it sprung, is turned into the means of its own destruction. Marriages celebrated by the *confarreatio* could only be dissolved by the *diffarreatio*: Festus sub voce. This ceremony was regarded with horror. Plutarch, in whose time it had not been abolished (*Quæst. Rom.* 50), tells us that Domitian was the first who permitted the Flamines to be divorced from their wives without it; and adds, οἱ δὲ ἱερεῖς παρεγένοντο τῇ τοῦ γάμου διαλύσει, πολλὰ φρικώδη καὶ ἀλλόκοτα καὶ σκυθρωπὰ δρῶντες. This law, which was of Tuscan origin, coupled with the law of Romulus, that the husband who divorced his wife without a sufficient reason forfeited all his property, half to his wife and half to Ceres (*Plut. in vit. Rom.* c. 22), may perhaps account for the long time which elapsed before the Roman husbands made frequent use of this privilege. The children of a marriage by *confarreatio* were called *Patrimi* and *Matrimi*, and were alone capable of holding the office of Flamines Majores (*Diales*, *Martiales*); and accordingly, in the corruption of Roman servitude, Tacitus informs us that it was not easy to find any one

qualified to fill that situation.—*Tac. Ann.* 4, 16; Gaius, I. 112. γάμος κατὰ τοὺς ἱεροὺς νόμους.—*Dion. Hal., Ant. Rom.* 2, 25.

The ceremony of *coemptio* is thus described by Gaius, I. 113:—"Coemptione in manum conveniunt per mancipationem, *i.e.*, per quandam imaginariam venditionem; nam, adhibitis non minus quam quinque testibus Romanis, item libripende, emit is mulierem cujus in manum convenit." Cicero (*De Orat.* 1, 56) alludes to this ceremony. It is not surprising, he says, "qui quibus verbis coemptio fiat nesciat, eundem ejus mulieris, quæ co-emptionem fecerit causam non posse defendere." This is probably the ancient method by which, after the law of Canuleius, marriages between the Patricians and Plebeians were solemnized. The *usus* is thus described by Gaius, I. 111: "Usu in manum conveniebat quæ anno continuo nupta perseverabat; nam velut annuâ possessione usucapiebatur, in familiam viri transibat, filiæque locum obtinebat." If the lady wished not to become a wife, *I. M. C.*, she slept for three nights in the year out of her husband's house.—*Cic. Pro Flacco*, 34.

Mater familias was the proper term to describe a wife in manu mariti.—*Quint. Inst.* 5, 10.

The second kind of *matrimonium justum*, *i.e.*, sine in manu conventionione, did not place the wife in the power of her husband, or remove her from the authority of her former guardians. This was probably the way in which Plebeian marriages were at first celebrated; and under the emperors every other kind of marriage became obsolete. The proper term for the wife sine in manu conventionione was *matrona*.—*Aul. Gell.* 18, 6.

The term "*injustum matrimonium*" was applied to the marriages between Patricians and Plebeians before the Canuleian law, and then to the marriages between Romans and strangers, or Latins.

The French law upon this subject is stated by Monsieur Duranton, in his celebrated "*Traité des Contrats*," with

particular circumstances, nor was it of general application, but that it would be rendered generally important, because the course of arguments had at the bar borne upon topics applicable to all husbands and all wives for the prevention of similar actions.

II. The want of authorities on this subject in our books—the reason of which, according to some, is the discretion of our ancestors, which was so great, that they would not publish and bequeath such matters to posterity, in order that the knowledge of their power (which would render the one cruel and the other disobedient) might be kept from wicked husbands and wives—which, so long as they are kept in ignorance of it, they will not endeavour to abuse. Another reason may be, that in their times no great cruelty prevailed, nor was there ever known among them such a case as is now before us; and therefore our ancestors did not think it necessary to guard by law against a crime which they did not suppose any would commit; semble, like the Athenians, who had no law against parricide, as they presumed that no man would kill his father.

And afterwards judgment was given for the defendant. But as some of the judges delivered their opinions in favour of the plaintiff, I shall repeat the substance of their arguments, as by way of objection. The judges who gave their judgment for the plaintiff, were MALLET and TWYSDEN, of the K. B., and TERRILL, J., in the Common Pleas; and the purport of their argument was as follows:—

I. Whether every law but ours obliges husbands to provide for the support of their wives.

II. Whether our law does, of itself, without the aid of the canon or other law, provide that husbands shall support their wives.

III. To examine the circumstances of this particular case.

I. Whether every law but our own imposes on a husband the duty of maintaining his wife? The laws of God, of nature, and of

his usual clearness and precision. It will be found vol. i., c. 2, sects. 2—4, under the head “Incapacité des Femmes mariées,” pp. 233—272:—“La règle que les femmes mariées ne peuvent contracter sans l’autorisation de leurs maris ou de justice, reçoit plusieurs limita-

tions.” See also Code Napoléon, Livre 1, Titre 5, Chap. 6, p. 220:—“La femme, si elle est marchande publique, peut, sans l’autorisation de son mari, s’obliger pour ce qui concerne son négoce, et au dit cas, elle oblige aussi son mari, s’il y a communauté entre eux.”

nations, tend greatly to promote and encourage matrimony, as the cause to which man owes the successive propagation and continuance of his race ; and it never can be supposed that laws which encourage such a state, would place either of the parties to it beyond their care, or expose them to the evils arising from separation, from cold and hunger. Holy Scripture enjoins husbands *quod amore afficiant uxores suas*. Therefore any neglect of wives can be considered in no more favourable light than a contempt of this ordinance, which, however, it is emphatically our duty to observe, —emphatically, because, before the sanction of divine authority, it was a law of nature, written on the hearts of all men, of which the practice of all nations is sufficient testimony. And though hardly any law gives the husband so much power on marriage as our own (the civil law, for instance, did not), nevertheless all laws oblige the husband to maintain his wife.

II. Whether our law of itself provides that husbands shall maintain their wives without having recourse to the civil or canon law ? and this question is twofold.

First. Whether our law provides a remedy in this case, of itself ?

Secondly. Admitting that it does not, what law would be supplemental to our law in such a case ?

First. Whether our law provides the remedy in itself ? They hold that it does ; and this they offer to prove—

1. By parallel cases ;
2. By reasons ;
3. By authorities.

1. From parallel cases. Matters depending in our courts are composed of an infinite number of special circumstances, and it therefore is as rare to find a precise correspondence between the facts of one case and those of another, as an exact resemblance in the face of one man to that of another. Therefore it is the wisdom of the sages of our law, by the analogy with other cases, to investigate their doubts, and thus to satisfy their judgments. Here the question is, will the contract of a wife for necessaries make her husband liable ? For nobody will dispute that usually the contracts of wives are void, as all their power is transferred to the husband by their marriage. Yet, as to matters necessary "*ad sustentationem vitæ*," this power is not transferred, but, on the

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contrary, established and made absolute in the wife by means of the marriage. This is founded on the necessity of the thing; and our law allows many persons who are otherwise disabled, in cases of necessity, to enter into contracts; as an instance, it is a general rule that the contracts of all infants are void, but, nevertheless, in cases of necessity their contract shall bind them. And that not only "*quoad esse, sed quoad necessitatem convenientiæ*." (b) And therefore it is, that, if an infant makes a contract to give a man so much for teaching him to read and write, this will bind the infant, as was decided in *Clare and Darrel's Case*, 2 Car. Ro. 527. The reason assigned is, that it is for the benefit of the realm that learning should be advanced; but more requisite is it that, as in our case, life should be preserved by reasonable sustenance. For this reason also the infant shall be bound, if he be a householder and buy necessaries for his family, as was adjudged in *Hill and Blacton's Case*, Trin. 15 Jac. Ro. 1374; and what has been said of an infant is applicable to an idiot, in case of housekeeping; and if an idiot makes a contract of matrimony, this may bind him, as was adjudged in *Stiles and West's Case*, 3 Jac.; yet it is generally admitted that the contracts of idiots are void. Also, if the master of a ship contracts for the necessary repairs therefor, this binds the owner, Hob. Rep. 11, *Bridgeman's Case*, although in that case the master was not obliged to repair it, yet, inasmuch as the repairs were necessary to save the ship from foundering, the law enables him to bind the defendant by his contract. By which case it appears that our law imposes a liability on persons in cases where the preservation of learning, the support of families, and the reparation of ships, are concerned, although without such special matter the persons in none of these cases would be charged: then, in this case, is the husband liable, inasmuch as the preservation of his wife's existence is at stake, which ought to be of far greater value in his eyes than any of the things above mentioned.

2. By reasons, *i.e.* reasons deduced from our law, and which are not general. And these are—

(1). As our law gives all that the wife has to her husband on

(b) *Peters v. Fleming*, 6 M. & W. 45; *Burghart v. Hall*, 4 Id. 727.

marriage, if wives shall not be allowed to obtain food and other necessities, wives will be in a worse condition than those who commit treason or felony, for felons shall be allowed from their goods reasonable estovers, to save them from starving. And the statute, Art. Cler. (c) provides that persons who abjure the realm shall have sufficient estovers of their goods. But women cannot enjoy this privilege if they can take nothing without the permission of their husbands, but they will be left to perish, Tantalus-like, from thirst and hunger, amid the overflowing exuberance of their husband's plenty.

(2). Our law is, that if the wife takes the goods of another and converts them to her own use, this is the trover and conversion of the husband, and so ought to be the writ; otherwise it shall abate, for a wife cannot make a conversion to her own use.

And TWYSDEN said, if a wife takes corn, makes bread, and eats the bread, this is the trover and conversion of the husband. And he said, if the wife buys cloth, or stuff, for her attire, and uses them, if the purchase be void as a contract, the husband and wife shall be charged in trover and conversion for the goods. Therefore if, as they who agree for the defendant suppose, there would be an evil in rendering the contracts of the wife binding on the husband, the mischief here would be equally great, in making the husband liable in trover and conversion.

(3). Our law allows that if the wife commits trespass, the husband shall be punished on her account; and if they shall be liable for torts committed by their wives against strangers, greater reason is there that they shall be liable to actions for things which the wife took for her necessary support, the rather as this is for the encouragement of trade, as it has been always usual that wives should purchase for themselves.

(4). If wives are beaten or wounded, they can bring no action on that account, but their husbands shall, and recover damages, as it is every day's experience that, if they go to a surgeon to be cured of their wounds, the husband pays for them; and this is, it seems, established by *Rippon and Norton's Case*, Cro. Eliz. 849. There it was resolved that the father is not bound to pay for the

(c) 9 Ed. 2, st. 1, c. 10. "*Nota quod cum quis abjurat regnum habebit camiciam tunicam et braccas, et totum residuum quicquid fuerit confiscatur Domino regi;*" Fitz. Gr. Abr., *Coronne et plees dell corone*, fol. 220, pl. 407.

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cure of his son's wounds ; and the reason assigned is, because the father shall not recover any damages for the wounding of his son ; which implies that, if he could recover damages, as the husband can, he should pay for the cure ; and therefore the husband shall pay for the cure of his wife. For, although our law makes a wife subject to her husband, yet the husband may not put her to death ; but this shall be murder ; neither can he beat her ; but the wife may swear the peace against him, 1 E. 4, 1 a ; and, by a parity of reason, he cannot starve her.

(5). If husbands shall not be bound by the contract of their wives for necessaries, without their real assent, husbands may abandon their wives without just cause, when they desire to have others, and thus cause them to perish ; and therefore it is more consonant to reason to say that husbands shall be liable for the contracts of their wives for necessaries, on an *assumpsit* in law ; or that, by marriage, a power is given to wives by the law to take all things necessary for support, by which contracts the husband shall be, during the marriage, irrevocably bound. And thus shall a security be provided for the wife against being stripped on each ungrounded suspicion, and of being starved on each wanton displeasure of her husband.

Again, if such cruelty shall be sanctioned, and wives shall not be allowed necessaries, England will lose the happy reputation in all foreign kingdoms, which her inhabitants have achieved by their respect for this sex, the most excelling in beauty, which, as in this climate it far transcends that of the women in all other lands, so has this kingdom surpassed all other countries in its tenderness and consideration for their welfare.

As to the objection that such a case is up to this time without precedent in these courts, and therefore according to Littleton's argument the action cannot be maintained, it was answered that, admitting such an action to be unprecedented, it is in our power to make a precedent, if we are warranted in so doing by sufficient reason. For there was no precedent of an action on the case against the executors in *assumpsit*, on the *assumpsit* of their testators, before 12 H. 2, as is seen at length in *Norwood and Read's Case*, Plowden, 182 a ; and if those judges were now living, yet would they have no reason to repent the delivery of

that judgment, since, the evil in such a case being general, it never could be too late for its redress.

3. By authorities.

As to the case of *Sir Nicholas Poins*, 7 Eliz., Dyer, 234, they said, that it is no authority for or against them, but a case of which the report is doubtful. But the places on which they chiefly relied were 11 H. 6, 30 b, *Scot's Case*, where Martin said, if the wife buys things not suited to the degree of her husband, the husband shall not be charged for them; but if they are suited to the degree of her husband, the husband shall be charged; which, they said, was an authority in point. And they cited also 20 H. 6, 21 b, where it was said by Markham, and 27 H. 8, 25 a, where it was said by Broke, that if the thing comes to the use of the husband, the husband shall be charged for the contract of his wife.

And for modern authorities they cited *The City of Worcester* and *Gerrard's Case*, 7 Car., which was, that Gerrard had married a woman possessed of considerable personal estate, which woman had a grandchild. The wife died; and the question was, whether Gerrard should maintain the child (for it is not within statute), and it was agreed by Cooke and Whitlock, J., to whom the case was referred, that Gerrard ought to maintain the grandchild, for the estate *transit cum onere*. *A fortiori*, therefore, he shall be compelled to provide for his wife. And in *Berrebloc and Michel's Case*, Cro. Jac. 257, the contract of the wife is admitted to be good in such a case: from all which it is manifest that our law of itself provides a remedy in such a case, without the aid of any other law.

Secondly. But admitting that our law provides no remedy, from what law shall our law receive assistance in such a case? It is the excellence of our law that its judges are illuminated and fortified by the concurrent justice and support of all other arts and sciences, and its honour that these great courts where it is administered are public, and interfere not with immodesty or indecent subjects, as divorces and other evils of matrimony, which are more easily allayed by private conference, than healed by public discussion; therefore it is said that no ill effect can result from the decision that at common law the contract of the wife does not bind the husband, for she has her remedy for alimony

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in the spiritual court. To which they answer that true it is that, if our law is assisted by any other law in this case, it is by the canon law, and the wife must sue in the spiritual court (for no other has, or pretends to have, a remedy for such a case) under the description of a cause matrimonial, for these causes and testamentary causes have long been under the jurisdiction of the spiritual court; as the Register says, *causæ quæ non sunt de matrimonio vel testamentis spectant ad curiam nostram*: and it was said that here the cause was *de matrimonio*, and therefore should be prosecuted in those courts. But it is answered that the Register is well explained by Fitz. N. B. 44 a, where a difference is established between actions for money given during marriage, and given on account of marriage: of the latter case the spiritual court has no cognizance (as it has of the former), because it is not matter solely concerning the marriage, but as a remuneration for it. So in this case the action is not exclusively founded on the marriage, but on the ill-behaviour or default of the husband in not providing necessaries for his wife, and therefore the action shall be maintained in the king's courts as well as in the preceding case; for in 48 Ed. 3, 18, it is well said that all matters concerning marriage are not matrimonial in such a sense as to fall under the jurisdiction of the spiritual court. As to suing in the spiritual court for alimony, that is a mysterious thing, and without legal authority, as they assert: for the word alimony is a term unknown in our ancient books, and it was never seen in our law until our modern reports in certain cases there of prohibition.

Wherefore, they who wish to understand it, must have recourse to ancient books for its definition, which you will find in Sum. Angl. title *Alimenta*, to be such—*similiter nomine alimonie veniunt necessaria vitæ quæ important vestes, cibos, medicinas, et hujusmodi*. And, inasmuch as this matter is foreign to our books, Littleton's argument may be well retorted upon those who argue for the defendant, that, if there be any such legal remedy for wives in that case, it must have been in existence before these times (*devant ceux heurs*), which it has not been.

Again, admitting that women may sue for alimony in the spiritual court, in this case no suit could be brought there for

these reasons,—1st. That there is no divorce, or any cause of divorce apparent in the case; and then the judges of the spiritual court informed TWYSDEN, J., as he asserts in his argument, that they never allow any suit for alimony, unless after a divorce, and sometimes pending a divorce it has been decreed.

2nd. As the wife can sue the husband in the spiritual court for alimony, so can the wife charge the husband in the king's court for necessaries, as has been proved; and parties may make election of their remedies. Those, therefore, on the part of the wife, are plaintiffs here, and have therefore their election to sue in the king's court, and those on the part of the defendant wish to refer the plaintiffs to another trial; to do which would be to exclude women from their birthright, for they are entitled to the benefit of the laws, and to have right to them as well as men; and, therefore, if a husband beat his wife, she can bind him to his good behaviour before a justice of the peace, or she may libel him in the spiritual court for a divorce "*causâ sævitie*." Since the suit in this case has been commenced in the king's court, we are bound to extend a remedy to the party, and not to refer him to the spiritual court.

It had been well observed by those who have argued for the defendant (as TWYSDEN, Justice, said), that in giving judgment in a novel case, especially one of such importance as the present, where there is reason to suppose that several remedies are applicable, they should be carefully examined, and that remedy should be adopted which is most beneficial, and such as may, in other cases, restrain husbands from cruelty, and wives from disobedience; and such a remedy the advocates of the defendant have supposed the suit in the spiritual court for alimony to provide.

But TWYSDEN said that he was now strongly impressed with the truth of the opinion, stated by a reverend divine (hard as the saying may appear), "That 'tis more than reason that goes to persuasion." For the very reasons urged by those who have argued for the defendant, of disobedience, which will be encouraged, if the remedy of the wife shall be at common law and not in the spiritual court, lead me to the conclusion, that her remedy shall be limited exclusively to the common law; and that the evil consequences before mentioned will most abundantly

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ensue, if the suit be in the spiritual court, and not at common law, will be manifest from what follows :—

1. It will make wives refractory and disobedient to their husbands, for the reason that the spiritual courts cannot settle alimony until after separation ; of which, if wives were once informed that they can obtain it (instead of seeking reconciliation), they will spare no industry to recover their liberties, and leave no means unemployed that may enable them to go into such companies, and at such times as they please. And the scandal and ignominy that a wife may thus bring upon a man, who still continues to be her husband, may be well imagined.

2. If the only means of compelling husbands to maintain their wives shall be in the spiritual court, this will make many husbands cruel to their wives, when they know that the most severe punishment which they can suffer is excommunication, and the indifference among men of this day for such a punishment is too well known ; and therefore the entangling of the body and soul of the husband in the meshes of excommunication will neither feed nor clothe the wife. And it seems that the parliaments of later times have noticed the general disregard for excommunication and imprisonment ; and therefore the statute concerning illegitimate children provides, not merely that the putative father shall be subject to the sentence of the ecclesiastical court, but also that such father shall give security to the parish, &c. And the statute 21 Jac. (c. 24), which provides that dying in execution shall be no satisfaction for the debt, shows the little regard men have for imprisonment, in which alone the terror of excommunication, so far as the bodily senses are concerned, exists. But the statute does not extend so far as to give satisfaction to wives, whose husbands may die in prison, if the wives are not starved outside before the husbands die. And for these reasons, the remedy in the spiritual court is, in this case, improper.

But it is objected that, if the remedy be at common law, it is unavailing ; because, although the wife may provide necessaries for herself, she has no property in them, and therefore the husband may seize upon them immediately, and strip her of her apparel. To which they answer that true it is that wives can acquire no property ; but yet, if the husband strip her of her

apparel and other necessities, this is a good ground for her to sue a divorce *causâ sævitiae*, as may be proved by authorities not contained in our books.

III. To examine the circumstances of this particular case: and these are—

1st. The departure of the wife, and her offer of cohabitation.

2nd. The prohibition of the husband to trust the wife.

3rd. The time in which this action was brought.

1st. The departure of the wife, and her offer of cohabitation.—

Admitting that her departure was without licence from her husband, this does not impair her right to a provision after her husband's death. And this, even if she remain "*cum adultero*," at common law, as appears by the statute providing that women lose their dower in the case last mentioned; and if this greater offence shall not affect her in her future interest, which is of far less importance than her present support, certainly the fact proved of her departure in this case shall not injure her, especially as she offers to renew the cohabitation, and she is desirous to expiate her past offence (if offence there was any) by future obedience. Suppose the case of a wife being imprisoned for felony, and the goaler supplies her with provisions, doubtless the husband shall be liable for all that is furnished; and this is most uncharitable, to suppose the wife, in this case, a greater offender than in the case last mentioned; hence they conclude, that the wife shall be maintained by the husband, notwithstanding her departure.

2nd. The prohibition of the husband to trust his wife.—It has been agreed, by all who have argued this case, that if the prohibition had been general, as by posting, or insertion in the "news-book," that no one should trust his wife, this would in itself be void; allowing, therefore, that the husband is liable in *assumpsit* by the law, for this has been argued, it seems clear that he shall continue to be liable, notwithstanding such particular and special prohibition, and that this prohibition is void. The reason why the general prohibition is void is, that, supposing it valid, the power given by the law to the wife, in enabling her to contract, is nugatory, as no one would contract with her; and the same reason applies to this case also; for, if the husband can prohibit one or two persons, he can, by the same argument, extend his

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prohibition over the whole kingdom ; and then, if the husband should adopt this method, and join the king's enemies, the wife must go too, and then she will be hanged—or stay at home, and then she will be starved ; the same evil must happen if the husband should be banished, &c. ; wherefore they conclude that to allow such a prohibition would be equally inconvenient as not to render the husband liable in *assumpsit* for necessaries with which his wife has been supplied.

3rd. The time in which the action is brought.—And for this reason judgment must be given for the plaintiff, as they said, admitting all that has been argued against them, that wives have no remedy in the king's courts, but only in the spiritual courts ; and their reason, in this particular case, that the wife ought to be relieved in the king's courts, was, that the contract, on which the action is founded, was made A.D. 1658, and the action brought 1659, at which time there were no spiritual courts or judges of which the new statute took notice, and therefore no suit could be brought for alimony ; wherefore, from necessity and *propter defectum justitiæ*, they might well sue in the courts of the king, as was the then usage and ordinary practice in cases of this nature—as, for instance, to sue for legacies.

Therefore, the three justices conclude that judgment should be given for the plaintiff. And TWYSDEN, J. (who had argued but too well for the plaintiff in the King's Bench), said that he was not any longer of the same opinion, though he had argued to that effect formerly. For the reasons, which are the causes of such judgments, ought not to be pursued farther than they are sanctioned by experience. And he said that he had ever accounted it a great honour to Justice Walshe, Plowden, 375 b, that after he had given judgment for the plaintiff in *Stowel* and *Zouch's Case*, after hearing the learned argument of the other judges, "*retraxit opinionem*," and gave judgment for the defendant.

Then all the other judges gave judgment for the defendant.

FOSTER, C.J., BRIDGMAN, C.J., HALE, C.B., HIDE and BROWNE, JJ., of the C. P., WINDHAM, of K. B., ATKINS and TURNER, Barons of the Exchequer. But though ATKINS gave judgment for the defendant, yet did he agree in everything with

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those who argued for the plaintiff, excepting in what concerned the special prohibition. For he held that the husband shall be liable in *assumpsit* for necessities furnished to his wife; but that he may restrain and control particular persons by his prohibition from delivering any goods to his wife, and as the defendant had given out a prohibition in this case he gave judgment for him. And, as the justices who argued for the defendant were the more numerous, judgment, for many weighty reasons, was given in his favour.

I will report concisely several points established in this great case.

First. The resolutions in which all the judges of England agreed, and these were reported by the Chief Baron to be,—
I. That husbands are bound to supply their wives with necessities; and here they agree *de re*, though they differ *de modo*. II. That the contract of a married woman is merely void, as far as she is concerned, by our law, however it may be different by the civil law. III. If the wife purchase goods, and the husband, by any act precedent or subsequent, ratifies the contract by his assent, the husband shall be liable upon it; if not on his *assumpsit* in law, yet on his *assumpsit* in fact, whether the goods are for himself, or for his children, or for his family. All which positions are so obvious, that they require no demonstration.

Secondly. The resolutions of those who gave judgment for the defendant (except ATKINS, Baron), and these were—

I. That the marriage does not give the wife any innate and uncontrollable power to render the husband liable.

II. That although the wife cannot bind her husband by her contract, yet she is not without a remedy; but by the common law, chancery may order her necessities, or, at least, the canon law (which is subservient to it) in the spiritual court.

III. That if the wife purchase goods, and it is found by special verdict that they were consumed in the household, yet the husband shall not be liable for them. But it shall be good evidence for the jury to find that the husband “*assumpsit*,” but not conclusive evidence.

IV. That admitting that the husband shall be liable in *assump-*

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sit at law, still if he specially forbids particular persons to trust his wife, the husband shall not be liable in spite of this prohibition.

V. Admitting that husbands shall be liable in *assumpsit* at law for necessities, the finding of the jury that the goods purchased for the wife are necessities, suitable to the *degree* of her husband, is not good.

(*Note*.—That these justices resolved certain other points in their arguments, but, as they do not bear upon the action, the reader will find them at the end of the case.)

I. *That the marriage does not give the wife any innate and uncontrollable power to charge her husband.* This they demonstrate, 1st, by reasons, and, 2ndly, by authorities. Reasons which are—(1). The nature of contracts; for in every contract there should be—*First*, The parties contracting: and with reference to this principle, some may be capable, *quoad hoc*, but not *quoad alterum*; as monks, to buy things for their house in vacation, and no other contract made by them is good. But in no case can wives contract, for they cannot be executors without the assent of their husbands; and hence, in this case, the supposed contract is fictitious, that is, the contract between the plaintiff and the husband. *Secondly*, In every contract the consent of the parties is necessary; and every consent is either expressed or implied. Implied consent is like that of the master to the act of the servant, and does not extend to this case. *Thirdly*, In every contract there is a tie or obligation which is the result of it, and this cannot be without lien or other assent. But none of them is here made by the husband; therefore, from the very nature of the contract, the husband, in this case, shall not be liable; and this reason is deduced from the disability of the person with whom the contract in reality was made.

(2). If the law willed to empower wives to contract, the same law would also have given them property, that they might retain, and this reason is deduced *ab inutili*, for now that the wife has obtained goods, the husband may seize upon them, and in this way render the purchase useless; or he may detain the wife in his house; and hinder her from going to the mercer's. And even this is not *sævitia*, on which to ground a supplication, for the wife has no power over the actions of her husband, as is

proved by the writ *cui in vitâ*, which runs, “*cui ipsa in vitâ suâ contradicere non potuit.*” And therefore BRIDGMAN, Chief Justice, said that, as far as relates to an act done by a married woman, it is merely void ; as if she levy a fine by the name of A., wife of J. S., the fine is merely void, *quia constat* by the record itself that she is married.

(3). There is greater reason that the wife should take the husband's goods and pawn them ; and that the husband should be obliged to redeem them ; but the first cannot be done, neither therefore can the second ; for although our law does not exclude the wife from all community in using the goods of her husband (and therefore it is not felony in her to take them, Stamford, 37 B.), yet she cannot dispose of them ; and therefore it was adjudged in Trin. 6 Jac. Ro. 1617, *Rice Rey* and *Thos. Steven's Case*, that, where the wife plays at cards and loses 40*l.* of her husband's money, the husband shall recover this in action of trover against the gamester.

(4). If the husband shall be bound by this contract, many inconveniences must ensue, as Wyndham, Justice, said.

1. The husband will be accounted the common enemy ; and the mercer and the gallant will unite with the wife, and they will combine their strength against the husband : so it may be said of them, as it was by Mowbray, J., 39 Ass. 1, in another case :—“ We see the wife and the defendant here of one mind, to the prejudice of the husband.”

2. The wife, having the goods, will be more violent in enforcing prosecution than our law permits, an evil which our law guards against : and therefore the goods of felons, during their lives, cannot be granted to anyone. See statute 1 R. 3, c. 3.

3. Wives will be their own carvers, and, like hawks, will fly abroad and find their own prey.

4. It shall be left to the pleasure of a London jury to dress my wife in such apparel as they think proper.

5. Wives who think that they have insufficient will have it tried by a mercer whether their dress is not too mean, and this will make the mercer judge whether he will dispose of his own goods or not. As to the inconveniences supposed on the other part, if the wife may not make the husband liable in cases of necessity, it was answered that in every argument *ab incon-*

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venienti the evils on each side must be balanced and examined ; and to the inconveniences already enumerated (which will result from thus making the husband liable) may be added, that the limits of necessity will be more difficult to determine than the present case, and that they on the other side have not well or sufficiently explained whether they mean *necessitatem convenientiæ*, or *necessitatem naturæ*. But be it how it may, the same necessity which justifies the wife in taking goods from the mercer would equally justify her in taking money from the usurer, &c. : and, if none will trust her, the same necessity, or a necessity yet more cogent, may qualify her to receive the rents or sell the goods of her husband. Hence, many absurdities must ensue. Also, their objection of necessity loses its weight in another respect, viz., that “the goods are necessaries” (and not that “there was necessity”) is the finding of the special verdict. Now necessaries and necessity are topics altogether distinct, and therefore their objecting this “*ingens telum necessitatis*” is nothing to the purpose.

(5). To charge the husband on the contract of his wife without his actual assent will tend to subvert the law of God and of nature, which has given the husband power and government over his wife : and this is the very saying of God himself, “*Erga virum appetitus tuus erit, et ipse regnabit in te.*” And as to their supposition that wives will be starved, our law does not presume this, but the contrary. For the law which presumes such affection between cousins, for the advancement of one by the other, that they shall not be suffered to bar their heirs without leaving them other payment, will presume greater love and affection between husband and wife ; who are so identical, as is laid down 21 E. 4, 27, that the obligation of the husband shall, if extorted by duress of his wife, be void ; and so it was adjudged 7 Jac., *Lantrell and Witherington’s Case*. True it is, as has been observed by those who have argued for the plaintiff, that the husband, by marriage, declares that he will sustain and comfort his wife, and that he says he will endow her with his worldly goods. But though husbands are bound, not by the law of God alone, but by the law of nature also, to maintain their wives, yet from this it cannot be inferred that they must be bound by their

contracts; since a father, by the law of God and nature, is bound to support his son, and *e contra*, in case the father is impoverished; but no one can infer from hence that one must be liable on the other's contract.

2ndly. For authorities, *Bill and Lake's Case*, Hutton's Rep. 106, is an authority in point; for though the case was settled by way of compromise, yet many of the judges delivered their opinion that the husband should not be liable; and BRIDGMAN, Chief Justice, said that *Sir Nich. Poin's Case*, 6 & 7 Eliz., Dyer, 234 b, is more than an authority for them; for he says that our question is there assumed *pro confesso*, and the doubt by Dyer is solely on the payment of the tailor, *scil.*, if this amounts to a consent: and therefore, without this consent of the husband, it is clear that he shall not be liable. Also, they say that, if there were no printed authorities for them, still it is clear that no action could lie in such a case, because there is no precedent or authority in its favour, for the only case on which they on the other side rely is the place 11 H. 6, 30 b, which at most is only a single opinion *obiter* by Martin; and therefore Littleton's argument is extremely applicable to their case, *scil.*, that if any such action could have been brought, it would have been brought before that time. And this is good ground for all judgments of such a nature where the parties have another remedy, as in this case they have, as will be said afterwards, and in this therefore it differs from the case of the executors before mentioned, for in that there was no remedy before. Touching authorities founded on the practice of the late times, BRIDGMAN, C.J. of the Bench, said that, though they all feel the greatest reverence for the learning and judgment of those who established it (as is manifest by the respect they show to them in other cases), yet, with regard to acts in doing which they made a virtue of necessity, nobody can expect that they should be sanctioned longer than the necessity continues; and this necessity, which sprung from the want of courts where the proper remedy could be applied, is now long removed.

II. *That although the wife cannot bind her husband by her contract, yet the wife is not without a remedy; but, by the common law, chancery may order necessaries for her, or, at any rate, the canon law, which is subordinate to it, in the spiritual court.*

1. The wife has a remedy for necessaries by the common

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law in chancery, according to the opinion of everyone, by the writ of "*supplicavit*," which you will find, Register 89; which writ, among other things, orders that the husband *bene et honeste tractabit et gubernabit* his wife; and, then those words, *bene et honeste tractabit*, mean that the husband is bound to provide reasonable *estovers* for his wife; and, among other remedies, you will find 4 H. 3, Ro. Claus. Memb. 11, and 8 H. 3, Ro., where the record says that the sheriff distrained on the husband to maintain his wife, and to give her reasonable *estovers*; but the husband there had previously been excommunicated for his obstinacy in not maintaining his wife; and those who argued for the defendant all agreed not to hazard their judgment on these authorities.

2. If the husband will not supply his wife with necessaries, she must make her complaint to the ordinary, and he may supply a remedy; and that this is the proper course and best adapted to such a complaint is manifest:

First. Because common modesty having prohibited such domestic differences between husband and wife from being disclosed before a jury, before whom all evidence must be given in public (which can only serve to embitter such internal quarrels, and to render them irreconcilable, as experience too clearly shows), our law permits that the bishop, who is a spiritual father, should, with the gravity and learning becoming his station, enter into this examination of what is proper, and, from respect to his duty, persuade husband and wife to a reconciliation; and the better to accomplish this, that the *arcana familiæ* should not be made public, the bishop himself, as BRIDGMAN, C.J., said, ought to examine the matter in private, taking with him his chancellor and his registrar, and if he finds all persuasion to a reconciliation useless, he must proceed to sentence, and this will be according to the demerit of the wife, and not according to the estate and degree of her husband, as a jury must proceed, which would be a pernicious precedent, since bad women would have as great provision as good women, when the default is on the part of the husband. But in the spiritual court, such bad women as have violated their vows shall have such provision as clerks convict, Stamf. 140: and shall be fed with the bread of affliction and the water of adversity.

Secondly. Because it is also a matter solely spiritual, by as much as the husband at the marriage endows her with his worldly goods *in facie ecclesiæ*, and they denied what was said on the other side, that the remedy in the spiritual court is only subsequent to the separation. For, though the libels in these cases are more frequently *propter sævitiam*, because the default in supplying necessaries is *sævitia*, yet shall there not always be separation on that account. But the husband may agree and give security to maintain his wife, and then they may cohabit. And as to what is said, that the ordinary has no coercive power, it was answered, that their power is of greater extent than any temporal execution, which can at most extend only to the body, which is of greater value than all the estate. But their execution extends to the body and the soul; and this, not only by reason of restraint, as imprisonment of the body, but also by means of disability, incapacitating body and soul from their temporal and spiritual rights, so as to disqualify the offender from receiving the sacrament, or maintaining an action; and therefore it is not to be presumed that the husband will continue in a state of excommunication and starve his wife, more than it is to be supposed that he will kill another for revenge, well knowing that for such a crime he must be hanged. So that, from all that has been said, it appears that the canon law is adequate for all the purposes and exigencies of the case (and our law, according to *Bunting's Case*, presumes that a fit judgment will be pronounced); but if they proceed wrongly, we may interfere by prohibition.

But inasmuch as more than reasons are required in this case, our courts are not without precedents, or our books without authorities in point as precedents; BRIDGMAN, C.J., cited many, which he held in his hand; anno 1585, the case of the *Lord Zouch and his Wife*, and others who have sued for a remedy in the spiritual court in such a case; and Cro. Jac. 364, says that the court of the ordinary is the proper court for the allowance of alimony; 12 Co. 50.

III. *That if the wife buy anything, and it is found by special verdict that this was consumed in the household, even then the husband shall not be liable for it. But this may be good evidence on which the jury may find that the husband "assumpsit," though it is certainly not conclusive.*

1. The first part of the resolution, *viz.*, that the husband shall

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not be liable without his actual assent, the employment of the goods for the benefit of the household notwithstanding, is expressly fortified by 34 Ed. 1, Fitz. Dett. 163. In Dett. the case was that the wife of the defendant bought from the plaintiff ten quarters of wheat, which were employed in the service of the defendant, and it was adjudged that the defendant should not be held liable; and such is the conclusion of the case, 21 Hen. 7, 40 b: "If my wife purchase goods for the maintenance of my household, as bread, &c., and I have no knowledge of it, I shall not be charged therewith, though it be expended in my household."

2. As to the second part of the resolution, that the employment for the use of the household is good evidence for the jury to have found that the husband undertook, but not binding evidence. If the factor or servant buy goods, and they come to the use of the master, the master shall be liable for them; 6 Eliz., Dyer, 230 b; Doctor and Student, 137, 138; and presumptive evidence shall weigh more in the case of a wife than of a servant: and therefore they said that if the husband is beyond sea in any voyage, and during his absence the wife purchase provisions or other things which are necessities for her, this is good evidence on which a jury may find that the husband *assumpsit*, and to that effect should the judge direct them, for it is good evidence to presume that the husband has at all times undertaken to pay for necessities. Therefore it was said that if the wife be absent from her husband, and the husband refuse to cohabit with her, and she purchase necessities, this is good evidence, &c.

But such evidence as has been stated above is not binding and conclusive, but merely presumptive evidence; and for this the *Chancellor of Oxford's Case*, 10 Co. 57, was cited, when in trover and conversion it was agreed that request and denial is good evidence for the jury to find for the plaintiff, but, being found specially, the court cannot therefore give judgment for the plaintiff; and therefore, in this case, the jury having found the matter specially, the court cannot give judgment against the husband: for that the goods were necessities, and that they were employed, is but matter of evidence, on which the jury should have proceeded to have ascertained the fact, whether the husband undertook or not,

which is not the province of the judge, for *ad quæstionem facti non respondent judices*. Also the husband might have rebutted such presumptive evidence by other proofs, as that he gave his wife ready money to make purchases, &c.

IV. *That admitting the husband to be by law liable in assumpsit, yet, if he specially prohibit particular persons from trusting the wife, the husband shall not be liable, in spite of his prohibition.* They all agree that a general prohibition that no one should trust his wife (supposing the husband legally liable in *assumpsit*) shall be void. And it was assimilated to the case where feoffment in fee is made on condition that the feoffee shall not infeoff any one, which is void; but, if it were upon condition that he should not infeoff J. S. or T. N., this is good; and to this purpose is 12 E. 4, 18; and 21 E. 4, 48 a, "If the king grants to anyone a discharge from service as a juryman, it is good; but if he grant that the whole county (*pais*) shall be discharged from this service, it is bad, since by this means would ensue a failure of justice." And it seems that our case will not differ from the case of a servant, who, although he may have authority to purchase goods, may yet be restrained from purchasing things of certain persons in particular. Nor is this an injury to the mercer; for the prohibition serves to give him notice that the purchaser is a married woman, and, if after that he will trust her, it is at his peril. But BRIDGMAN, Chief Justice of C. P., differed from many in this point, for he said that, supposing it admitted that the husband shall be liable in *assumpsit* on the contract of his wife, then no person could be restrained from selling to the wife by any prohibition of the husband, since the power the wife would have, as must be allowed, would be her inheritance, and uncontrollable: but if this was not admitted it had been agreed that the general prohibition of the husband is void, because by this the wife will be without relief; and such particular prohibition may have the effect of a general prohibition, if the husband choose particularly to prohibit everyone in the country to whom his wife can by any possibility have access, and therefore he agreed in this point with those who had argued for the plaintiff: and, on the other hand, supposing the law to be such as the defendant pleaded, *viz.*, that the husband is not liable in *assumpsit* for his wife's contract, then is the prohibition idle and nothing

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to the purpose, inasmuch as the law forbids anyone to give her credit, and so *quâcunque viâ datâ*, this prohibition is immaterial.

V. *That admitting that husbands are legally liable in assumpsit for necessities, the finding of the jury that the goods in question are necessities suitable to the degree of the husband is not good ;—*for the law wills that wives should be maintained in a manner suitable, not to the degree, but to the estate of their husbands, and it is not reasonable that the wife of a poor knight of 200*l.* a year shall be arrayed in the same expensive manner as the wife of a knight of 2,000*l.* a year ; and therefore, under the circumstances of this case, it is altogether impossible that judgment should be given for the plaintiff. For the jury ought to have found that the goods were necessities suitable to the estate and degree of the husband, or that they were necessities generally.

And, after this great consideration, judgment was prayed for the defendant in the King's Bench, and given accordingly. Also the judges who pronounced in favour of the defendant, resolved in their argument—

1. That when wives are allowed by their husbands to be housekeepers, and are in the habit of purchasing goods for the household without ready money, in this case the husband is liable, and to this purpose is 14 Hen. 7, Fitz. Dett. 160 : “ If I command my wife to purchase goods and she purchase them, I shall be liable for them ; ” and so it was agreed, 21 Hen. 7, 40 b ; and so is the constant practice, and it has always been allowed ; for in this case the wife is as a servant, and therefore if the wife is in the habit of buying goods for ready money, and the husband empowers her to act in this way only, or after he has empowered her, countermands her authority, and in such a case the wife buys goods which are employed for the service of the household, yet shall not the husband be liable for them. For it is not the employment of the wife, but the assent of the husband, which is the foundation of the action ; and this appears from the cases above cited, and from Br. Contract, 40.

2. It was resolved, that if anyone deliver goods to a married woman, whether under colour of contract or otherwise, he cannot

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charge the husband in any action whatever for their price ; for, if in such case the husband may be charged for all the goods which the wife took in trover and conversion (as TWYSDEN'S, Justice, opinion is), it would be useless to consider how husbands may be compelled to support their wives : for in this way every wife may be her own carver, to take and to dispose of as great a quantity of goods as she thinks proper. But our books are not without authorities on this point, as appears by the case of the *Frères Mineurs*, 11 H. 4, 31, where the case is that they take an infant and put clothes upon him, and the father of the infant gains possession of him again clad in their habiliments, and it was then held that the father should have the apparel in which the infant was clad ; for now, by putting them on the back of the infant, the property was in him, and therefore the guardian of the friars could not recover ; and Hankford, C.J., said : “ If an adulterer take the wife of another, and clothe her well in new robes, the husband may retake the wife in her new robes.” So if robes be put on an image, the property is in the church. And they declared also that the law was, that if anyone should deliver goods to an infant by contract, knowing that he was an infant, the infant shall not be liable in trover and conversion for them ; for in this way all the infants in England would be ruined. And they remembered that it was doubted whether trover and conversion would lie against a bailiff, as in 11 Jac., Mo. Rep. 841, where it was resolved in the affirmative. But if the goods be delivered to the wife, not knowing that she was married, or to the infant, not knowing that he was an infant, it shall be otherwise.

3. It was resolved by some of the justices that if the wife will not cohabit with her husband, but during the time of her voluntary departure purchases provisions and clothes for herself, and it is given in evidence to the jury that these were necessaries suited to the estate and degree of her husband, yet is this not sufficient evidence to warrant a finding by the jury in *assumpsit* against the husband, and therefore it was said, and not denied, that there is a difference for this purpose between wives that are willing to cohabit with their husbands, and those that spontaneously depart from them ; and this appears by Magna Charta,

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which provides that wives shall have their quarantine after the death of their husbands, but nevertheless if they choose to depart from the mansion house during any part of the said forty days, they shall not have *estoveria de communi* during that time. And a case between *Waller* and *Hanger*, 12 Jac., Banc. Reg., was cited, where the king granted to the citizens of London to be free of prisage; and J. S., one of the citizens, who was owner of a ship fraught with wine, was disfranchised before its arrival; wherefore J. S. shall pay prisage, for he was discharged solely as a citizen, and therefore, being disfranchised, he loses his privilege. So it was said that the law presumes that the husband will furnish necessities for his wife so long as she is a member of his family, and that he undertakes to pay for such necessities. But when the wife voluntarily abandons and relinquishes her family, by this conduct she renders herself incapable of enjoying the before-mentioned privilege, and places herself without the pale of her husband's maintenance; and therefore it shall not be presumed that the husband has entered into such an *assumpsit* in that case.

(In order to show in what manner the doctrine established by the principal case of *Manby v. Scott* was followed up in later times, the cases of *Montague v. Benedict* and *Seaton v. Benedict* are here inserted.)

MONTAGUE v. BENEDICT.

HILARY.— & 6 G. 4, K. B.

[REPORTED 3 B. & C. 631.]

In *assumpsit* for goods sold it appeared that the plaintiff, a jeweller, in the course of two months, delivered articles of jewellery to the wife of the defendant, amounting in value to 83*l.*; that the defendant was a certificated special pleader, and lived in a ready-furnished house, of which the annual rent was 200*l.*; that he kept no man-servant; that his wife's fortune upon her marriage was less than 4,000*l.*; that she had, at the time of her marriage, jewellery suitable to her condition; that she had never worn, in her husband's presence, any articles furnished her by the plaintiff; and that the plaintiff, when he went to the defendant's house to ask for payment, always inquired for the wife, and not for the defendant: Held, that the goods so furnished were not necessities, and that, as there was no evidence to go to the jury of any assent of the husband to the contract made by his wife, the action could not be maintained.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial, before ABBOTT, C.J., at the Middlesex sittings, after Trinity Term, 1824, it appeared that the plaintiff was a working jeweller, and the defendant a special pleader in considerable practice. The plaintiff between the 20th of October and the 14th of December, 1823, had delivered to the wife of the defendant, at his house in Guildford-street, different articles of jewellery, amounting in the whole to the sum of 83*l.*, and had received from her on account 34*l.* These things were usually delivered about twelve o'clock in the day, and plaintiff never saw any person but the defendant's wife. Upon these facts being proved the defendant's counsel contended that the plaintiff ought to be nonsuited, because there was no evidence to show that the husband had any knowledge that the goods had been delivered to his wife, and, consequently, no evidence of the assent to the purchase, and *Metcalf v. Shaw* (a), *Waithman v. Wakefield* (b), *Bentley v. Griffin* (c), were cited. The Lord Chief Justice thought it a question for the jury, whether the articles had been

(a) 3 Camp. 22.

(c) 5 Taunt. 356.

(b) 1 Camp. 120.

supplied with the assent of the husband. The defendant proved that he was married in September, 1817, and that the fortune of his wife was less than 4000*l.*, and that she received, by virtue of her marriage settlement, for her exclusive use, a sum of 60*l.* annually; that they inhabited a ready-furnished house in Guildford-street, at the rent of 200*l.* a year; that the furniture of it was not new or expensive, some of it indeed being very shabby; that the defendant kept no man-servant; that his wife, before October, 1823, had jewellery suitable to her condition, and that she had never, in her husband's presence, worn any of the articles furnished by the plaintiff. The defendant usually left his house and went to his chambers about ten o'clock in the morning, and did not return before five in the evening. When the plaintiff or his servant called at the defendant's house, they always asked for his wife, and not for him; and upon one occasion, when the clerk called in March, and stated to the female servant who opened the door that he called for the purpose of getting settled a bill for jewellery to the amount of 80*l.*, the servant expressed her surprise that the plaintiff had trusted her mistress for such a sum, and said she was sure that her master knew nothing of it, and she swore that the clerk replied, "his master was aware of that." This, however, was denied by the clerk. The Lord Chief Justice told the jury that a husband was not liable for goods supplied to his wife, unless he gave her an express or implied authority to purchase. In considering the question of authority, the estate and degree of the parties was a fit subject for consideration, and so also was the nature of the articles. There were some things which it might and must always be presumed the wife had authority to buy, such as provisions for the daily use of the family over which she presided; but in this case the articles were not necessary to anyone; the proof was, that the husband never saw them, and the jury were to say, under these circumstances, whether the wife of the defendant had any authority from him to make a contract for the articles in question. The jury found for the plaintiff to the amount of his bill. A rule *nisi* had been obtained for a nonsuit, on the ground that there was no evidence to be left to the jury of the husband's assent to the contract; or for a new trial, on the ground that the verdict was against the weight of evidence.

Platt showed cause. It was a question for the jury, upon the evidence, whether the articles provided for the wife of the defendant were necessaries suitable to the degree and estate of the husband. The latter is responsible in respect of the contracts made by the wife, for goods suitable to that condition which he suffers her to hold out to the world. It is not necessary to show an express assent of the husband to the contract, or that the articles provided were worn in his presence. If they were conformable to the apparent condition of the husband, his assent is to be presumed. Here there was abundant evidence to go to the jury that the things provided were necessaries suitable to the degree of the husband, for it appeared that he lived in a ready-furnished house, the rent of which was 200*l.* per annum, and that his wife had originally a fortune of 4000*l.*, and if they were necessaries suitable to the degree of the husband, then cohabitation was evidence of his assent to the contract made by his wife. He cited *Morton v. Withens* (d).

Scarlett and Gurney, contra. It appeared upon the trial that the plaintiff, in the course of two months, had delivered to the defendant's wife articles of jewellery amounting to 83*l.*, and that before that time she had articles of that description suitable to her degree. The things provided by the plaintiff, therefore, were not necessaries. There was no evidence of any assent (express or implied) of the husband, to the purchase made by the wife. Cohabitation is only *primâ facie* evidence of such assent, and here it was rebutted by the evidence given on the part of the defendant.

BAYLEY, J.—It seems to me that in this case there was no evidence to go to a jury to entitle the plaintiff to a verdict. I take the rule of the law to be this: if a man, without any justifiable cause, turns away his wife, he is bound by any contract she makes for necessaries suitable to her degree and estate. If the husband and wife live together, and the husband will not supply her with necessaries, or the means of obtaining them, then, although she has her remedy in the Ecclesiastical Court, yet she is still at liberty to pledge the credit of her husband for what is strictly necessary for her own support. But whenever the husband and wife are living together, and he provides her

(d) *Skinner*, 348.

(BAYLEY, J.)

with necessaries, the husband is not bound by contracts of the wife, except where there is reasonable evidence to show that the wife has made the contract with his assent: *Etherington v. Parrot* (e). Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence; and when such assent is proved, the wife is the agent of the husband duly authorised. Then the question is, was there any evidence in this case to warrant my Lord Chief Justice in submitting, as a question for the consideration of the jury, whether the wife had the authority of the husband to make this purchase? It appears that the wife had originally a fortune under 4000*l.*; that would yield an income less than 200*l.* per annum. There was no evidence on the part of the plaintiff to show that she had a fortune even to that extent; that fact appeared afterwards upon the defendant's evidence. Then, is it to be presumed, that a husband working hard for the maintenance of himself and family, keeping no man-servant, and living in a house badly furnished, would authorise his wife to lay out, in the course of six weeks, half of her yearly income in trinkets? If the tradesman in this case had exercised a sound judgment, he must have perceived that this money would have been much better laid out in furniture for the house, than in decking the plaintiff's wife with useless ornaments, which would so ill correspond with the furniture in the house. I think, at all events, there was gross negligence on the part of the plaintiff, if he ever intended to make the husband responsible. If a tradesman is about to trust a married woman for what are not necessaries, and to an extent beyond what her station in life requires, he ought, in common prudence, to inquire of the husband if she has his consent for the order she is giving; and if he had so inquired in this case, it is not improbable that the husband might have told him not to trust her. But no such inquiry was made; on the contrary, the plaintiff always inquired for the wife, and that is strong evidence to show that she was the person trusted, and not the husband. On the whole, I think that the plaintiff did not make out, by reasonable evidence, that the wife had any authority to make the purchase in question.

(e) 1 *Ld. Raym.* 1006; 1 *Salk.* 118.

HOLROYD, J.—I think the plaintiff ought to have been nonsuited. If the plaintiff had made a claim in respect of necessities provided for the defendant's wife, the case would have stood upon a very different ground; but I think, upon the evidence, it appeared that the things provided were not necessities. They consisted of articles of jewellery, and the wife had, upon her marriage, been supplied with a sufficiency of such things, considering her situation in life. Undoubtedly the husband is liable for necessities provided for his wife, where he neglects to provide them himself. If, however, there be no necessity for the articles provided, the tradesman will not be entitled to recover their value, unless he can show an express or implied assent of the husband to the contract made by the wife. Where a tradesman takes no pains to ascertain whether the necessity exists or not, he supplies the articles at his own peril; and if it turn out that the necessity does not exist, the husband is not responsible for what may be furnished to his wife without his knowledge. Where a tradesman provides articles for a person whom he knows to be a married woman, it is his duty, if he wishes to make the husband responsible, to inquire if she has her husband's authority or not; for where he chooses to trust her, in the expectation that she will pay, he must take the consequences if she does not. If it turn out that she did act under the authority of her husband, when she gave the orders, he will be liable, but otherwise will not. If we were to hold that he would, no man in any case would be safe, if the wife chose to say that she had the authority of her husband. I think that the burden of the proof of the assent of the husband lies on the party who provided the goods, and who acted upon the supposed authority. In this case, it appears to me that the proof was to the contrary, and that it negatived all presumption of assent on the part of the husband. I think, therefore, that the plaintiff did not make out a case to entitle him to recover.

LITTLEDALE, J.—I agree in thinking that a nonsuit must be entered. The husband is not liable in respect of a contract made by his wife without his assent to it, and a party seeking to charge him in respect of such a contract is bound either to prove an express assent on his part, or circumstances from which such assent is to be implied. Then, was there an express assent in

(LITTLEDALE, J.)

this case? So far from that, it appears that no application was made to the defendant for several months after the articles had been delivered; but the plaintiff always called when he knew the defendant was from home, and always asked for the wife. There was, therefore, no express assent of the husband. Then, can we say that there was any implied assent? There are many cases in which the assent of the husband may be presumed. In Comyn's Digest, tit. *Baron and Feme* (Q.), it is laid down that if the wife trades in goods, and buys for her trade when she cohabits with her husband, his assent is to be presumed; and if a wife buy *necessary* apparel for herself, the assent of the husband shall generally be intended. But here the apparel provided consists of articles of ornament of considerable value. It does not appear, considering the defendant's occupation, and his wife's fortune, that articles of jewellery to that amount can be considered as necessary apparel, and one reason is because the wife had articles of that description provided for her when she married, and there is no evidence to show that the husband ever saw the wife wearing these articles, and if he did not, then there is nothing to show any implied assent.

ABBOTT, C.J.—I entirely agree with the opinion which has been delivered by my learned brothers, and I think the rule for a nonsuit ought to be made absolute. If this decision should have the effect of introducing somewhat more caution into the conduct of those who are to obtain their living by selling their goods and wares, it will be most beneficial. It will occasionally be beneficial to infants, to fathers, to husbands, and to friends. It will also be beneficial to those who have goods to sell; for the experience we have in courts of justice leads us to know that persons who trade without due caution often find their hopes deceived: they find in the result that they have parted with goods for which they never can obtain the money. The rule must be made absolute.

Rule absolute for a nonsuit.

SEATON *v.* BENEDICT.

TRINITY, 9 *GEO.* 4, *C. P.*

[REPORTED 5 *BING.* 28.]

A husband, who supplies his wife with necessaries, is not liable for debts contracted by her without his previous authority or subsequent sanction.

ASSUMPSIT for goods sold and delivered. The defendant pleaded the general issue, except as to 10*l.*, which he tendered and paid into court.

By a bill of particulars, it appeared that the plaintiff's demand amounted to 28*l.* 5*s.* 6*d.* for kid gloves, ribbands, muslins, lace, silks, and silk stockings, thirteen pairs of which, of a very expensive description, were charged for as being delivered on one day.

At the trial before Burrough, J., Middlesex sittings after Hilary Term last, it appeared that the defendant, a gentleman in the profession of the law, was, at the time when the plaintiff furnished the goods, living with his wife at Twickenham, and had supplied her wardrobe well with all necessary articles; that the plaintiff, a tradesman at Richmond, had, without the defendant's knowledge, furnished the defendant's wife with the articles for which this action was brought, the greater part of which were delivered to her in the plaintiff's shop, and the remainder into her own hand at the defendant's door.

It did not appear that the defendant had seen her wear any of them, except, perhaps, the gloves and some of the silk stockings, the price of which did not amount to 10*l.*

On behalf of the defendant it was contended that these articles were not necessary for the wife of a person in his degree; that no actual authority for them had been proved; and that an authority could not be implied for the purchase of anything but necessaries.

The learned judge told the jury he should have been of this

opinion but for the plea of tender : that plea admitted that the wife had authority to purchase some of the articles ; and as it was not stated in respect of which of them the tender had been made, it must be taken to apply to all, admitting the authority to purchase them all, and contesting only the price at which they were charged.

A verdict, therefore, was taken for the plaintiff for 18*l.* 5*s.* 6*d.*, with leave for the defendant to move to set it aside, if the learned judge should be thought to have given an effect to the tender which it ought not to have.

Wilde, Serjt., accordingly obtained a rule *nisi* for a new trial on the ground that the goods furnished were not necessities, and that no authority could be implied from the tender except an authority to purchase goods to the extent of 10*l.*

Taddy, Serjt., showed cause. The finding of the jury decides that the articles in question were necessities in the defendant's station ; and his authority for the purchase of them must be implied from the tender. The tender admits the existence and validity of the contract made by the wife ; and as it does not distinguish any particular articles in respect of which the money has been paid into court, it must be taken that the only matter in dispute is the amount of the price. In *Bennett v. Francis* (a), where a defendant who had possessed himself of goods belonging to the plaintiff, and had sold part and kept the residue in specie, paid money into court generally upon a declaration containing a count for goods sold and delivered, it was held he admitted the transaction to have been converted into a contract. In *Montague v. Benedict* (b), where the husband was held not liable, the articles were not necessities ; and in *Holt v. Brien* (c), and *Bentley v. Griffin* (d), the credit was given to the wife. If this were the case of any other agent, as of a servant, no doubt could be raised after the tender of the validity of the contract.

Wilde.—The tender does not admit a contract beyond the amount of the sum paid into court ; *Cox v. Parry* (e) ; nor that the goods sold were the property of the plaintiff ; *Blackburn v. Scholes* (f) ; and will not render the defendant liable if he would

(a) 2 B. & P. 550.

(b) 3 B. & C. 631, *ante*, p. 463.

(c) 4 B. & Ald. 252.

(d) 5 Taunt. 356.

(e) 1 T. R. 464.

(f) 2 Camp. 341.

not be so upon the facts of the case ; as to which, the wife must have an authority like any other agent. If she be not supplied with necessaries by her husband, there is an implied authority to contract for them ; but if she be adequately supplied, an express authority must be shown. The principle has been clearly laid down in *Montague v. Benedict*. Holroyd, J., says : “ The husband is liable for necessaries provided for his wife, where he neglects to provide them himself. If, however, there be no necessity for the articles provided, the tradesman will not be entitled to recover their value, unless he can show an express or implied assent of the husband to the contract made by the wife.” And in *Etherington v. Parrot (g)* it was holden that the husband was not liable where his wife took up goods and pawned them.

BEST, C.J.—I think there ought to be a new trial in this case. The learned judge left the point correctly to the jury, but gave too much effect to the payment of money into court. Independently of that, the defendant, in point of law, was entitled to a verdict. A husband is only liable for debts contracted by his wife on the assumption that she acts as his agent. If he omits to furnish her with necessaries, he makes her impliedly his agent to purchase them. If he supplies her properly, she is not his agent for the purchase of an article, unless he see her wear it without disapprobation. In the present case the husband furnished his wife with all necessary apparel, and he was ignorant that she dealt with the plaintiff. No article was delivered in his presence, nor was there distinct proof that any had been worn. If, therefore, money had not been paid into court, the defendant was clearly entitled to a verdict. What, then, is the effect of that payment? If the money had been paid in on the first items of the bill, an authority to contract at the date of these items would have been acknowledged—an authority which could not afterwards have been retracted but by express notice. But there is no evidence to show that the money was not paid in on the last items ; and if so, there was no agency for the first. The payment into court, therefore, recognizes no agency beyond the amount of 10*l*. And, if so, there is no pretence for supporting this verdict. It may be hard on a fashionable milliner that she is precluded from supplying a lady without previous inquiry into

her authority. The court, however, cannot enter into these little delicacies, but must lay down a law that shall protect the husband from the extravagance of his wife.

GASELEE, J. (*h*).—It is difficult to lay down an abstract rule with respect to the liability of the husband; but on the subject of the payment of money into court I entertain no doubt. Payment into court generally, in *assumpsit*, admits nothing beyond the amount of the sum paid in. Where, indeed, there is a special contract, the payment into court admits that contract; but where, as in the common *indebitatus assumpsit*, the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due (*i*).

In *Cox v. Parry*, *Blackburn v. Scholes*, and *Bennett v. Francis*, the claim arose on a single transaction.

On these grounds it seems to me that too much weight was attached to the circumstance of the payment into court. The jury were probably embarrassed by it, and the verdict ought not to stand.

Rule absolute.

(*h*) Park, J., was at the Old Bailey, Q. B. 154; *Hennell v. Davies*, (1893) 1 Q. B. 367.

(*i*) See also *Steavenson v. Berwick*, 1

PARTS of the celebrated case of *Manby v. Scott* are reported by various authors. Sir O. Bridgman's argument is given at great length in Bannister's edition of his judgments from the Hargrave MSS.; that of Hyde, J., is to be found in 1 Mod. 124; that of Hale, C.B., in Bac. Abr., tit. *Baron and Feme*. The case is noticed in 1 Keble, 69, 80, 87, 206, 337, 361, 383, 429, 441, 482; 1 Mod. 124; 1 Vent. 24, 42; 2 Vent. 155. The report of Levinz, coupled with that of Siderfin, contains, however, the substance of all the arguments on either side.

General principle.

Debenham v. Mellon.

Manby v. Scott.

The wife, from the mere fact of marriage, has no authority to pledge the husband's credit, except in the particular case of *necessity*; this necessity arises when the wife is living apart from the husband, through his fault, and is not properly provided for, but not, as a general rule, when they are living together; *Debenham v. Mellon*, 5 Q. B. D. 394, 6 App. Cas. 24. This was the principle affirmed in *Manby v. Scott* (*ante*, p. 451):—"Marriage does not give the wife any

innate or uncontrollable power to render her husband liable."

And it is to be found as far back as Fitzherbert:—"A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority to his bailiff or servant to buy and sell for him; and so for the contract of his wife, if he giveth authority to his wife, otherwise not;" F. N. B. 12 G. Consequently, as a general rule, whenever a husband is sued on his wife's contract made during coverture, the only question is, whether she had his authority, either *express* or *implied*, to make the contract; see particularly *Jolly v. Rees*, 15 C. B. N. S. 628; *Eastland v. Burchell*, 3 Q. B. D. 432; *Debenham v. Mellon*, *supra*.

When an express authority is set up, there can be no difficulty, except as to its construction, or the credibility of the witnesses called to prove it.

An implied authority may be shown from the previous conduct of the husband. Thus, under the ordinary circumstances of cohabitation, the husband may do acts, or consent to acts, which hold the wife out as his agent for certain purposes; *Debenham v. Mellon*, *supra*; *Manby v. Scott*, *ante*, p. 460; *Clifford v. Burton*, 1 Bing. 199; *A.-G. v. Riddle*, 2 C. & J. 493; *M'George v. Egan*, 5 B. N. C. 196. As this authority arises from the husband's conduct, so is its extent measured thereby; *Meredith v. Footner*, 11 M. & W. 202.

A common example of authority implied from conduct is the case in which the husband has paid previous bills. "If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognised continues;" *per* Thesiger, L.J., *Debenham v. Mellon*, *supra*.

In the same case Bramwell, L.J., seems to express the opinion that the husband, when he and his wife are cohabiting, *holds her out* as having authority to pledge his credit for articles "of such a kind and character that persons living in the same class of life and having the same means and living in the same neighbourhood are in the habit of ordering on credit," so that if he means to negative such authority "he not only must give her notice that he withdraws it, but *must also inform the tradesmen with whom she might deal* that the presumable authority is withdrawn;" 5 Q. B. D. 398. But this seems entirely contrary to the

Express
authority.

Implied
authority.

Payment of
bills.

Dictum of
Bramwell, L.J.

principles of the decision of the court of C. P. in *Jolly v. Rees*, *supra*, and of the H. L. in *Debenham v. Mellon*. There is no decided case which supports the above *dictum* of Bramwell, L.J.; and it is submitted that the husband does not, by the mere fact of cohabitation, *hold out* his wife as his agent, and that he is not bound, in the management of his household, by the practice of his neighbours, supposing that such practice can be proved.

Notice of
revocation.

If the husband has held out his wife as having authority to bind him, such authority cannot be got rid of by any private understanding or agreement between them, as regards any person who has relied on that authority, unless such person has notice that such authority has been terminated; *Manby v. Scott*, *ante*, p. 460; *Etherington v. Parrot*, 1 Salk. 118; *Debenham v. Mellon*, *supra*, where expressions in *Johnston v. Sumner*, 3 H. & N. 261, were explained on that footing by Lord Selborne; see *Ryan v. Sams*, 12 Q. B. 460, where a man, who had cohabited with his mistress, and held her out as having authority to bind him, was, after separation, held liable to a tradesman who, without notice of the separation, relied on such authority.

Authority as
to necessities.

There is, however, what has been called "another species of implied authority," which may arise out of the relation in which the husband and wife stand to one another, and it is to this that the observations in this note will be confined. The cases on this subject are divisible into two classes.

Two classes
of cases.

1. *Where contracts are made by the wife during cohabitation.*

2. *Where contracts are made by the wife while living apart from her husband.*

First class.
Presumption
from co-
habitation.

1. The question whether a wife has authority to pledge her husband's credit, while they live together, is a question of fact to be determined on all the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances; *Debenham v. Mellon*, *supra*; see especially, *per* Lord Selborne. The ordinary state of cohabitation between husband and wife gives rise to a presumption of authority to do things which, in the ordinary circumstances of cohabitation, it is usual for a wife to do. This is an implication of fact, which may be rebutted, and is not a conclusive presumption; *Id.* In the ordinary case of the management of the household the wife is the manager, and is usually presumed to have authority to manage in her own way certain departments of the house-

hold expenditure, and to pledge her husband's credit in respect of matters coming within those departments; *Id.*, *per* Thesiger, L.J., 5 Q. B. D. p. 402. The same presumption arises when the actual manager is not the wife, but merely a woman living with a man as his wife or his mistress, or is a housekeeper or steward, or merely a superior servant; *Debenham v. Mellon*, *per* Lord Selborne, and *per* Bramwell, L.J.; *Manby v. Scott*, *ante*, p. 458; *Watson v. Threlkeld*, 2 Esp. 637; *Blades v. Free*, 9 B. & C. 167; *Robinson v. Nahon*, 1 Camp. 245; *Mace v. Cammel*, Lofft, 782; *Edwards v. Farebrother*, 3 C. & P. 524.

The presumption is that the wife has authority to pledge her husband's credit for *necessaries* suitable to his station in life, or to the station which he permits her to assume; *Manby v. Scott*, *ante*, pp. 458, 460; *Etherington v. Parrot*, 1 Salk. 118, *per* Lord Holt; *Waithman v. Wakefield*, 1 Camp. 120; *Montague v. Benedict*, *ante*, p. 466; *Jolly v. Rees*, 15 C. B. N. S. 628, 640; *Debenham v. Mellon*, *supra*. The best definition of *necessaries* seems to be that given by Willes, J., in *Phillipson v. Hayter*, L. R. 6 C. P. 33, viz., articles "really necessary and suitable to the style in which the husband chooses to live," in so far as they "fall fairly within the domestic department which is ordinarily confided to the management of the wife;" see also *Jolly v. Rees*, *supra*. But if the husband knowingly permits his wife to assume an appearance beyond his own station, he may be liable for articles suitable to the assumed appearance, as for necessities; *Waithman v. Wakefield*, *supra*. The onus of proof that the articles supplied are necessities lies on the tradesman who seeks to charge the husband; *per* Willes, J., *Phillipson v. Hayter*, *supra*. (See further, as to necessities, *post*, p. 487).

Presumption
as to
necessaries.

What are
necessaries.

As has been already pointed out, this presumption may be rebutted by evidence showing that in the circumstances of the case the wife had no authority to pledge her husband's credit. In cases where there has been nothing done or consented to by the husband to hold the wife out as his agent, and he has not known of and acquiesced in the particular transaction, the presumption may be rebutted by showing that:—

Presumption
rebuttable.

How rebutted.

1. The husband expressly warned the tradesman not to supply goods on credit; *Manby v. Scott*, *ante*, p. 459; *Etherington v. Parrot*, 1 Salk. 118; see *Holt v. Brien*, 4 B. & Ald. 252.

Tradesman
warned.

Articles
already
supplied.

2. The wife was already supplied with a sufficiency of the articles in question; *Reneaux v. Teakle*, 8 Exch. 680; *per* Holroyd, J., *Montague v. Benedict*, *ante*, p. 467; *Atkins v. Curwood*, 7 C. & P. 756. In *Reneaux v. Teakle*, Pollock, C.B., held that evidence that the wife had, without the husband's knowledge, procured clothes from other tradesmen, was "admissible for the purpose of showing that she was already sufficiently provided with clothes."

Allowance.

3. The wife was supplied with a sufficient allowance, or sufficient means, for the purpose of buying the articles without pledging the husband's credit; see *Manby v. Scott*, *ante*, p. 459, where it was said: "Also the husband might have rebutted such presumptive evidence by other proofs, as that he gave his wife ready money to make the purchases;" and *Debenham v. Mellon*, *supra*, where Lord Selborne said: "Much less can he be bound in a case like this where they were not living apart, and when he made her an allowance sufficient to cover all proper expenditure for her own and her children's clothing."

Notice.

In *Holt v. Brien*, 4 B. & Ald. 252; *Ruddock v. Marsh*, 1 H. & N. 601; and *Debenham v. Mellon*, *per* Bramwell, L.J., there are *dicta* which seem to lay down that notice to the tradesman of the allowance is necessary; see also *Johnston v. Sumner*, 3 H. & N. 261; *Moylan v. Nolan*, 17 Ir. C. L. R. 427. It is clear, however, that notice is necessary only in those cases in which the husband has by his acts or conduct held out his wife as his agent to pledge his credit; *Jolly v. Rees* and *Debenham v. Mellon*, *supra*; see also *ante*, p. 473.

Wife for-
bidden.

4. The husband expressly forbade his wife to pledge his credit. This was established in *Jolly v. Rees*, 15 C. B. N. S. 628, which was subsequently approved and followed by the H. L. in *Debenham v. Mellon*, 6 App. Cas. 24.

Order
excessive.

5. The order, though for necessaries, was "excessive in point of extent," or, having regard to the smallness of the husband's income, extravagant; *per* Lord Abinger, *Freestone v. Butcher*, 9 C. & P. 643, approved in *Lane v. Ironmonger*, 13 M. & W. 368; see also *Spreadbury v. Chapman*, 8 C. & P. 371; *Atkins v. Curwood*, 7 C. & P. 756, 760; *Montague v. Benedict*, *ante*, pp. 466, 468.

Special agency
of necessity.

The above propositions must be taken subject to the proviso that if the husband, though cohabiting with his wife, neglects his duty to supply her with the necessities of life, she may have a right, which has been called "a special agency of necessity," to pledge his credit for the purpose of

obtaining such necessities; see *per* Lord Selborne, and Bramwell, L.J., *Debenham v. Mellon*; also *Jolly v. Rees*, 15 C. B. N. S. 628, 639; and *Montague v. Benedict*, *ante*, p. 465.

It must also be observed that the contract of the wife does not bind the husband, if the tradesman gives credit, not to the husband at all, but to the wife *exclusively*, knowing her to be a married woman; *Bentley v. Griffin*, 5 Taunt. 356; *Metcalf v. Shaw*, 3 Camp. 22; *Holt v. Brien*, 4 B. & Ald. 252; *Jewsbury v. Newbold*, 26 L. J. Ex. 247.

Credit to wife.

The provisions of the Married Women's Property Act, 1882, s. 1 (3), by which contracts made by married women are to be deemed to be made with respect to and to bind their separate property, unless the contrary be shown, do not in any way affect the liability of a husband on contracts made by his wife, *as his agent*, under the express or implied authority above discussed. Of course, under certain circumstances, the fact that the wife has separate estate may be evidence to rebut the presumption that she contracted as her husband's agent; see *Freestone v. Butcher*, 9 C. & P. 643.

45 & 46 Vict. c. 75.

2. The second class of cases is that in which *the wife at the time of making the contract is living apart from the husband*. We have just seen that, during cohabitation, there is some presumption that the wife has authority to pledge her husband's credit. But in this second class of cases there is no such presumption. "Where the wife is not living with the husband, there is no presumption that she has authority to bind him, even for necessities suitable to her degree in life; *it is for the plaintiff to show that under the circumstances of the separation, or from the conduct of the husband, she had such authority*;" *per* Abbott, C.J., *Mainwaring v. Leslie*, M. & M. 18; see *Johnston v. Sumner*, 3 H. & N. 261, 268.

Second class of cases : parties separated

no presumption of authority.

It remains, therefore, to inquire under what circumstances the husband is liable on the wife's contracts when she is not cohabiting with him.

Husband's liability.

On this subject the rule was laid down by Lord Mansfield in *Ozard v. Darnford*, Selw. N. P. (13 ed.), p. 228, thus :— "Where husband and wife live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her, and the spiritual court will compel him to grant her an adequate alimony. But if she elope from her husband and live in adultery, or if, upon separation, the husband agrees to make

General rule. *Ozard v. Darnford*.

her a sufficient allowance and pays it, in either of these cases the husband is not liable, because, in the former case, she forfeits all title to alimony, and in the latter has no further demands on her husband. And as, in all cases, the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiry as to the terms of separation; for in such cases he must trust her at his peril."

Circumstances
of separation.

The husband and wife may have ceased to cohabit under various circumstances. Thus, they may have separated by mutual consent; or one of them may have left the other without the other's consent and without good cause; or the misconduct of one of them may have justified the other in separating.

Separation by
consent,
primâ facie,
revocation of
authority.

Separation by mutual consent.—If husband and wife cease to cohabit by mutual consent or agreement, the separation is, *primâ facie*, a revocation of any authority which the wife may have previously had; *Wallis v. Biddick*, 22 W. R. 76; see *Mainwaring v. Leslie*, *supra*; *Johnston v. Sumner*, 3 H. & N. 261; and notice of this revocation need not be given to tradesmen, unless they have had previous dealings with the wife upon the husband's credit and under his authority, express or implied, in which case they have the right to assume that the authority continues until they have notice to the contrary; *Wallis v. Biddick*, *supra*, where the previous dealings had been for *ready money*, and the tradesman was held not entitled to recover.

Notice to
third persons
unnecessary,
unless there
were previous
dealings.

In what cases
authority
may, never-
theless, exist.

But though separation by mutual consent is, *primâ facie*, a revocation of any authority in the wife, nevertheless there are cases in which the circumstances attending the separation can be shown to be such that the inference may properly be drawn that the wife has authority to pledge her husband's credit after the separation.

Express
agreement.

If upon separation by consent it was expressly agreed by the parties that the wife might pledge the husband's credit, then she, of course, has authority to do so.

Implied
agreement.

If no definite arrangement was made as to the wife's maintenance, and she has no adequate means of maintaining herself, unless she pledge the husband's credit, it may be inferred that the husband in fact intended that she might pledge it for suitable necessities, or, in other words, tacitly agreed that she might do so; *Johnston v. Sumner*, 3 H. & N. 261, 267; see *Liddlow v. Wilmot*, 2 Stark. 86; *Clifford v. Laton*, M. & M. 101; *Emmett v. Norton*, 8 C. & P. 506;

Dixon v. Hurrell, Id. 717; *Hindley v. Westmeath*, 6 B. & C. 200, 215.

But an inference that she has authority cannot be drawn if the circumstances of the case negative it. Thus, it cannot be drawn if the husband has agreed to make the wife a sufficient or a fixed allowance and has carried out his agreement; *Eastland v. Burchell*, 3 Q. B. D. 432, 436; see *Liddlow v. Wilmot*, *supra*; *Emmett v. Norton*, 8 C. & P. 506, 511; *Mizen v. Pick*, 3 M. & W. 481; *Wallis v. Biddick*, 22 W. R. 76.

No authority where agreed allowance paid.

It is otherwise when the husband has neglected to perform his agreement, for then the wife is entitled to pledge his credit for suitable necessities; *Ozard v. Darnford*, *supra*.

Secus where agreed allowance not paid.

If his agreement be to make the wife an allowance, without definitely fixing its amount, that is an agreement to make a reasonable and adequate allowance, having regard to the station in life and respective means of the parties. Supposing that he has made her some allowance, the question whether that allowance is reasonable and adequate may be raised; *Hodgkinson v. Fletcher*, 4 Camp. 70; *Holder v. Cope*, 2 C. & K. 437; see *Eastland v. Burchell*, *supra*; but any allowance will be presumed to be sufficient until some evidence to the contrary is adduced; *Johnston v. Sumner*, 3 H. & N. 261, 270.

Agreement for uncertain amount.

If, however, the parties agree upon the amount of the allowance, in that case the question whether the allowance is reasonable or adequate cannot be raised. For then the parties have themselves agreed upon the amount to be considered sufficient, and the only question is whether or no that agreed amount has been paid; *Eastland v. Burchell*, 3 Q. B. D. 432.

Agreement for fixed amount.

The rule that the wife has authority when the agreement is broken may be justified on more grounds than one. It may be said that it is an implied term of the agreement that if the husband neglect to provide the allowance, the wife may pledge his credit, in order that she may not suffer by his neglect; *Johnston v. Sumner*, 3 H. & N. 261, 269; or it may be said that, as the husband, by making the agreement, recognised that his duty to maintain his wife will continue, his subsequent neglect to perform that duty clothes her with an "agency of necessity."

Reason of husband's liability when allowance not paid as agreed.

If the agreement be broken, the wife is not confined to her remedy upon it, even though it be under seal; nor, if the agreement be made with a trustee for her, is the trustee;

Liability on implied promise, though agree-

ment under seal.

for he may supply her with necessaries and recover the cost from the husband, as upon an implied promise, in the same way as may any other person ; *Nurse v. Craig*, 2 B. & P. N. R. 148.

Extent of liability.

The extent of the husband's liability for necessaries for his wife, where he has broken his agreement to pay a fixed sum, appears to be commensurate with the amount of the allowance which he ought to have paid her ; see *Emmett v. Norton*, 8 C. & P. 506, 512 ; *Johnston v. Sumner*, 3 H. & N. 261, 268 ; *Eastland v. Burchell*, *supra* ; *Hunt v. De Blaquiére*, 5 Bing. 550.

No authority where unnecessary.

An inference of authority in the wife cannot be drawn when no definite arrangement has been made for the wife's maintenance, but the husband has in fact supplied her with sufficient means, or she herself has adequate means of supporting herself independently of him. For then the inference would be unreasonable ; *Liddlow v. Wilmot*, 2 Stark. 86 ; *Clifford v. Laton*, 3 C. & P. 15 ; *Johnston v. Sumner*, 3 H. & N. 261, 266. The husband is entitled to show that, though he made her no allowance, she had adequate means from other sources ; *Id.* ; and *Eastland v. Burchell*, 3 Q. B. D. 432, 436.

Revocable pension.

An inference of authority was drawn in *Thompson v. Hervey*, 4 Burr. 2177, where the only means that the wife had was a pension revocable at pleasure ; and so it was in *Burrett v. Booty*, 8 Taunt. 343, where the husband had transferred property to trustees for his wife by deed, but the trustees had not acted on the deed or supported her out of the property.

Deed not acted on.

Notice of allowance unnecessary

If the husband has in fact made the wife an allowance, whether under an agreement or not, the question whether a tradesman who trusts her has had notice of the allowance or of its payment is immaterial ; *Mizen v. Pick*, 3 M. & W. 481, which settled the doubt caused by what Lord Eldon is reported to have said in *Rawlins v. Vandyke*, 3 Esp. 250.

No authority contrary to express agreement.

No inference of authority in the wife can be drawn if the parties have in fact separated under an express agreement that the wife is to maintain herself, or that the husband is in no event to be liable for her maintenance ; *Biffin v. Bignell*, 7 H. & N. 877 ; *Eastland v. Burchell*, *supra*. It must be observed that if the husband states to his wife that he will agree to her living apart on the terms only that she does not pledge his credit, and she refuses to agree to this, yet leaves

Wife not accepting husband's terms, lives apart without his consent.

him, she must be taken to be living apart either on those terms, or, if not, then without his consent ; Id.

In *Hornbuckle v. Hornbury*, 2 Stark. 177, the wife, while living apart, pledged the husband's credit with a tradesman, and the husband, though he had agreed to pay the wife a *fixed* annuity and had paid it, was held liable, because after the debt had been incurred he expressly promised the tradesman to pay it. Lord Ellenborough ruled that the promise was strong evidence that the annuity was inadequate. It is doubtful whether this ruling could be now followed, since it has been decided in *Eastland v. Burchell*, *supra*, that in the case of a *fixed* annuity the question of adequacy is immaterial. In *Harrison v. Hall*, 1 M. & Rob. 185, it was doubtful whether the amount of the allowance had been actually agreed upon, but Lord Tenterden ruled that the husband was liable upon an express promise to pay, whether the allowance he had paid was adequate or not. The reporter's comment is that the promise was *nudum pactum*. If similar cases should again arise, perhaps the husband might be held liable because his promise recognised and so *ratified* the wife's contract.

Express
promise of
husband to
pay.

When parties are found living apart from one another, there is a presumption, until the contrary be shown, that they are doing so by mutual consent and without any special fault on either side ; *Emmett v. Norton*, 8 C. & P. 506, 511 ; *Clifford v. Laton*, M. & M. 101. They may be doing so, though they have never executed any separation deed ; *Reeve v. Conyngham*, 2 C. & K. 444, 446, n. The fact that they have executed such a deed is not conclusive evidence that they live apart by consent ; for it may be shown that the deed was not acted upon, and that the separation took place some time afterwards, and against the will of one or other party ; *Hindley v. Westmeath*, 6 B. & C. 200. It must be observed that a deed, not for an *immediate*, but for a *future*, separation, is void, as being against public policy ; *Durant v. Titley*, 7 Price, 577 ; *Hindley v. Westmeath*, *supra* ; *Cocksedge v. Cocksedge*, 14 Sim. 244 ; *H. v. W.*, 3 K. & J. 382 ; see *ante*, vol. i., p. 366.

Presumption
of consent
when parties
living apart.

Deed un-
necessary.

Deed not
acted on.

Notwithstanding the payment of an adequate allowance, the husband is liable for the expense of a decent interment of his wife when she dies, and is bound to repay the expense to the person who incurred it, whether as an undertaker or as a mere volunteer. This liability is imposed by law out of a regard for decency and the comfort of others ; *Ambrose*

Husband's
liability for
cost of wife's
funeral.

v. *Kerrison*, 10 C. B. 776; see *Jenkins v. Tucker*, 1 H. Bl. 91; *Bradshaw v. Beard*, 12 C. B. N. S. 344. In *Chapple v. Cooper*, 13 M. & W. 252, an infant widow was held bound by her contract to pay for her husband's funeral.

Meaning of
"Desertion."

When the parties had separated by mutual consent the husband did not become guilty of "desertion" under the Married Women (Maintenance in Case of Desertion) Act, 1886, upon the wife offering to resume cohabitation; and the fact that he had not paid her the allowance agreed upon when they separated was immaterial; *Pape v. Pape*, 20 Q. B. D. 76; *R. v. Leresche*, (1891) 2 Q. B. 418; *Chudley v. Chudley*, 69 L. T. 348, 617; see also *Mahoney v. McCarthy*, (1892) P. 21. The same interpretation must be placed upon the word "deserted" in the Summary Jurisdiction (Married Women) Act, 1894, which supersedes the above Act as from 1 Jan., 1896. (See *post*, p. 487.)

Separation
through
wife's mis-
conduct.

Separation owing to the wife's misconduct.—If the wife live apart from the husband without his consent, and without justifiable cause, or if the husband has justifiably separated himself from her, then she has no authority whatever to pledge his credit for anything. "If she leaves without her husband's consent, it is clear she has no authority. She has none of the ordinary authorities of a wife, for she is not in the ordinary case of a wife, viz., living with her husband; she has no necessary authority, because she has brought her condition on herself, and can return; she has no express or implied authority;" *Johnston v. Sumner*, 3 H. & N. 261; see also *Eastland v. Burchell*, 3 Q. B. D. 432, 435.

Wife has no
authority,
if she
improperly
leaves her
husband;

e.g., if she
leaves merely
without his
consent,

or elopes with
an adulterer.

This rule applies where the wife has simply left her husband against his will; see *Hindley v. Westmeath*, 6 B. & C. 200; *Child v. Hardyman*, 2 Str. 875. It applies, *a fortiori*, where the wife has eloped with an adulterer; *Car v. King*, 12 Mod. 372; *Morris v. Martin*, 1 Str. 647; *Mainwaring v. Sands*, 2 Id. 706; see *Robinson v. Greinold*, 1 Salk. 119; S. C., as *Robison v. Gosnold*, 6 Mod. 171.

Or if she
commits
adultery after
separation.

So, where the parties were previously separated, and the wife commits adultery, the husband, unless he has condoned or connived at it, is not liable even for necessities subsequently supplied to her; *Cooper v. Lloyd*, 6 C. B. N. S. 519, 524; *Atkyns v. Pearce*, 2 Id. 763; and the fact that the separation originated in the husband's cruelty or adultery, or because he improperly turned the wife out of doors, is immaterial; *Govier v. Hancock*, 6 T. R. 603; see *Woodward v. Dowse*, 10 C. B. N. S. 722. It must be observed, however,

that if the parties separated by mutual consent, and upon the terms of a deed whereby the husband covenanted to pay an allowance for the wife during her life, and not merely for so long as she should live chastely, her subsequent adultery does not release him from *liability on the covenant*; *Jee v. Thurlow*, 2 B. & C. 547; *Baynon v. Batley*, 8 Bing. 256; *Fearon v. Aylesford*, 14 Q. B. D. 792; *Sweet v. Sweet*, (1895) 1 Q. B. 12.

Effect of *no dum casta* clause in deed of separation.

If the wife commits adultery while the parties live together, the husband is justified in turning her away, and she then has no authority to pledge his credit; *Ham v. Toovey*, Selw. N. P. (13th ed.) 228; *Hardie v. Grant*, 8 C. & P. 512; nor is he then liable to support her under the Poor Law Amendment Act, 1868, s. 33; *Culley v. Charman*, 7 Q. B. D. 89; or to be convicted under the Vagrancy Act, 1824, s. 3, for refusing or neglecting to maintain her; *R. v. Flintan*, 1 B. & Ad. 227. Her adultery appears to be the only cause for which a husband is justified in turning his wife away; *Wilson v. Glossop*, 19 Q. B. D. 379, 20 Id. 354; but see *Russell v. Russell*, (1895) P. 315. He is not justified in doing so if he has *condoned* the adultery; *Harris v. Morris*, 4 Esp. 41; see *Cooper v. Lloyd*, 6 C. B. N. S. 519; *Houlis-ton v. Smyth*, 3 Bing. 127, 130; or if he has *connived at it*; *Wilson v. Glossop*, *supra*.

Husband entitled to turn wife away for adultery.

Unless condoned, or connived at.

A husband who, upon discovering his wife's adultery, himself goes away, leaving her in possession of the house, but otherwise making no provision for her, continues liable for necessaries supplied to her by tradesmen who have no notice of the adultery and separation; *Norton v. Fazan*, 1 B. & P. 226; for she is "still the apparent mistress of his establishment;" *per Willes, J.*, *Cooper v. Lloyd*, 6 C. B. N. S. 519, 521.

Norton v. Fazan.

Where, in an action for the price of necessaries supplied to the wife, the husband's defence is that his wife committed adultery, a verdict in the Divorce Court in a suit for dissolution of the marriage is not admissible evidence of the adultery, being *res inter alios acta*; *Needham v. Bremner*, L. R. 1 C. P. 583; nor, for the same reason, was a verdict in an action for criminal conversation; *Hardie v. Grant*, 8 C. & P. 512. (See *post*, p. 755, *ad finem*).

Verdicts not evidence of adultery.

Separation owing to the husband's misconduct.—If the husband has wrongfully separated from the wife, or if she has left him for a justifiable cause, she has an authority of necessity to pledge his credit for her necessary maintenance, unless

Separation through husband's misconduct.

Authority of
necessity.

she has adequate means for that purpose. "If a man," said Lord Eldon, in *Rawlyns v. Vandyke*, 3 Esp. 251, "will not receive his wife into his house, he turns her out of doors; and if he does so, he sends, with her, credit for her reasonable expenses." "Where a wife's situation in her husband's house," said Lord Kenyon, in *Hodges v. Hodges*, 1 Esp. 441, "is rendered unsafe from his cruelty or ill-treatment, I shall rule it to be equivalent to his turning her out of the house; and that the husband shall be liable for necessaries furnished to her under these circumstances."

Instances.

Thus, a husband is liable for necessaries supplied to his wife, if he has shut his doors against her without cause; *Thompson v. Hervey*, 4 Burr. 2177; *Forristall v. Lawson*, 34 L. T. 903; or deserted her; *Deare v. Soutten*, 9 Eq. 151 (see *ante*, p. 482); or compelled her to leave the home owing to his adultery; *Bazeley v. Forder*, L. R. 3 Q. B. 559; or owing to his cruelty; *Baker v. Sampson*, 14 C. B. N. S. 383; or from a reasonable fear of personal violence; *Houliston v. Smyth*, 3 Bing. 127 (where Best, C.J., ruled that she was not bound to wait until actual violence had been committed); or on account of his having introduced a prostitute; *Aldis v. Chapman*, Selw. N. P. (13th ed.) 232; and *Horwood v. Heffer*, 3 Taunt. 421, to the contrary, cannot be treated as law; see *per* Parke, J., *Houliston v. Smyth*, *supra*; and also *Dickinson v. Dickinson*, 62 L. T. 330, where it was held to be an act of desertion for the husband to compel his wife to leave the home by forcing an adulteress upon her.

A husband shuts his doors against his wife without good cause if he does so on account of her adultery, at which he has connived; *Wilson v. Glossop*, 20 Q. B. D. 354; or which he has condoned; *Harris v. Morris*, 4 Esp. 41.

Presumption
of wife's
authority
irrebuttable
by express
prohibition.

It will be observed that, in cases where the husband unjustly turns the wife out of doors, or treats her with such cruelty that she is forced to leave him, her right to bind him for her necessary expenses does not rest on a mere *primâ facie* presumption of authority, but on an irrebuttable presumption of law; see *Johnston v. Sumner*, 3 H. & N. 261; *Eastland v. Burchell*, 3 Q. B. D. 432, 436; *Debenham v. Mellon*, 6 App. Cas. 24, 31, *per* Lord Selborne.

Boulton v.
Prentice.

This was the point decided in *Boulton v. Prentice*, Selw. N. P. (13th ed.) 233. In that case the husband had driven his wife out of the house by cruelty; the plaintiff was a person whom, during the cohabitation, he had expressly

forbidden to trust his wife, but who had, after the separation, supplied her with necessaries, for which he sued the husband. It was objected that the credit given to the wife is grounded on the supposed assent of the husband, which assent cannot be supposed where there is an express prohibition; but the court resolved that, "though the prohibition took effect and continued in force *during the cohabitation*, yet such prohibition could not, *after the cohabitation ceased*, either extinguish or lessen the credit to which the wife was *by law* entitled, after the husband had turned her away, and refused to maintain her: for the husband, by such conduct, gave the wife such a general credit as amounted to a revocation of the prohibition. If the husband, in a case of this kind, could prohibit one person from trusting his wife, he might *pari ratione* prohibit many; and this might be extended so far as to deprive the wife from obtaining any credit whatever, so that particular prohibitions might amount to a total prohibition."

The foregoing propositions as to the husband's liability, where the separation is due to his own misconduct, must, it seems, be taken subject to this: that if he makes the wife an adequate allowance, or if she has adequate means independently of him, he will not be liable for her debts, even for necessaries; for in this respect there can be no difference, in principle, between a separation due to the husband's misconduct and a separation by mutual consent.

There is, however, one case in which it has been held that the wife can bind the husband, while living apart, even though he allow and pay her a sufficient maintenance. It is where the expense is incurred for the purpose of protecting her, by articles of the peace, against his own violence; *Turner v. Rookes*, 10 A. & E. 47. This seems correct (though an exception from the ordinary rule), since, whatever may be the amount of her means, he can have no right to diminish them by his misconduct. The principle of this exception appears to have been recognised in *Beale v. Arabin*, 36 L. T. 249, where the husband was held liable for medical expenses, caused, at least in part, by his cruelty: though the case was also treated as a case where an allowance, adequate if paid, had been left unpaid.

Separation by act of law.—The parties may also be separated by act of law.

A wife who is undergoing a term of imprisonment has no authority to pledge her husband's credit; see *Fowles v.*

Limits of wife's authority.

Notwithstanding allowance, husband liable for cost of protection of wife by articles of peace.

And for medical expenses caused by his cruelty.

Separation by act of law.

Imprisonment.

Dinely, 2 Str. 1122; and it seems that, whenever the separation is due to the imprisonment of one party, it must be treated, on principle, as a separation without the other party's consent and without good cause; see *Drew v. Drew*, 13 P. D. 97, where it was held that, if a husband leave his wife under such circumstances as will make his absence, if continued for two years, amount to desertion, the time does not cease to run while he is undergoing a sentence of penal servitude. In the case of a convict felon, the administrator of his property has power, under 33 & 34 Vict. c. 23, s. 16, to pay an allowance out of the convict's property or income for the maintenance of his wife and family. A convict felon cannot himself make a contract while undergoing his sentence; ss. 8, 30.

33 & 34 Vict.
c. 23.

Judicial
separation.

The separation by act of law upon which questions have generally arisen regarding the wife's authority is that consequent on a divorce *a mensâ et thoro* or a judicial separation.

Alimony.
Ecclesiastical
courts.

While the jurisdiction to decree such divorces was vested in the ecclesiastical courts, it was a question entirely for those courts whether or no they would decree alimony to the wife. If they refused to decree it, as usually happened in cases of her misconduct, the wife had no power to bind her husband; and if they decreed it, she had no power to bind him so long as he duly paid the alimony decreed; and the question whether the alimony was sufficient could not be entertained by a court of law, even though the decree had, in point of form, ceased to be operative; *Wilson v. Smyth*, 1 B. & Ad. 801; but if the alimony was not paid, the wife's power revived; *Hunt v. De Blaquiere*, 5 Bing. 550; and, with regard to necessities supplied to the wife before the decree, the decree did not take away the husband's liability, even though it made the alimony payable as from a date prior to the time when the necessities were supplied; *Keegan v. Smith*, 5 B. & C. 375.

High Court.

The 20 & 21 Vict. c. 85 substituted sentences of judicial separation for divorces *a mensâ et thoro*; and it transferred the jurisdiction of the ecclesiastical courts in matters matrimonial to the Court for Divorce and Matrimonial Causes. Under the Judicature Act, 1873, that jurisdiction is now exercised by the Probate, Divorce and Admiralty Division of the High Court, which in such matters proceeds (subject to the 20 & 21 Vict. c. 85 and the Acts amending it) as nearly as may be upon the principles and rules formerly acted upon by the ecclesiastical courts; see 20 & 21 Vict. c. 85, s. 22

Goodden v. Goodden, (1892) P. 1. Under the above Act, a sentence of judicial separation has the effect which a divorce *a mensâ et thoro* formerly had (s. 6); and so long as the separation lasts the husband is not liable for the wife's engagements or contracts, wrongful acts or omissions, or for her costs in law-suits, unless alimony has been decreed to the wife and he has not duly paid it; in which case he is liable for necessities supplied for her use (s. 26).

Under the Summary Jurisdiction (Married Women) Act, 1895, a married woman can summarily obtain an order against her husband, having, while in force, the effect in all respects of a decree of judicial separation on the ground of cruelty, in cases where he has been summarily convicted of an aggravated assault upon her; or has been sentenced, on indictment for assaulting her, to a fine above 5*l.* or to imprisonment beyond two months; or where he has deserted her (see *ante*, p. 482); or caused her to leave and live apart from him by persistent cruelty to her or wilful neglect to maintain her or her infant children (ss. 4, 5 (a)). She can also obtain an order for the payment by her husband to her of a reasonable weekly sum not exceeding 2*l.* (s. 5 (c)). No order, however, can be made under the Act where the wife has committed an act of adultery, unless the husband has condoned or connived at it, or has condoned thereto by his wilful neglect or misconduct (s. 6).

58 & 59 Vict.
c. 39.
Summary
order.

When the parties are living apart, and the husband is liable for necessities supplied to his wife, the term *necessaries* seems to include everything which the wife needs, and which is suitable for her, having regard either to the husband's means and position, or to the allowance or alimony which he ought to have paid her. Thus, in *Hunt v. De Blaquiére*, 5 Bing. 550, it was left to the jury to say whether furniture for a house was a necessary, having regard to the alimony decreed to her, or whether the wife ought to have taken ready-furnished lodgings; and in *Emmett v. Norton*, 8 C. & P. 506, the jury had to say whether horses and carriages were necessities, having regard to the parties' circumstances.

Meaning of
"necessaries"
where parties
living apart.

In *Bazeley v. Forder*, L. R. 3 Q. B. 559, it was held that a wife, living apart from her husband on account of his adultery, was entitled to pledge his credit for the maintenance of their child under seven years of age of whom she had the lawful custody against the husband's will by a Chancery Order under 2 & 3 Vict. c. 54. See *ante*, vol. i., p. 145.

Bazeley v.
Forder.

Cost of articles
of peace,
necessaries ;

notwith-
standing
means.

Husband's
liability for
cost of divorce
proceedings.

Though prac-
tice of Divorce
Courts for
obtaining
wife's costs
not pursued.

In re Hooper.

Dictum, that
divorce pro-
ceedings must
be successful ;
quære.

The cost of articles of the peace properly exhibited against the husband in consequence of his outrageous conduct towards his wife is a necessary ; *Shepherd v. Mackoul*, 3 Camp. 326 ; see *Williams v. Fowler*, M'Clel. & Y. 269 ; and in this case the husband cannot rely on the fact that his wife already has a sufficient maintenance ; *Turner v. Rookes*, 10 A. & E. 47 ; see *ante*, p. 485.

So, if the wife leaves her husband from reasonable fear of personal violence, and it becomes necessary, for her protection, to obtain judicial separation, the law gives her authority to pledge her husband's credit for the costs of the proceedings, and the question whether the husband is liable or not depends upon whether, at the time when the proceedings were begun, there was such reasonable ground in fact for anticipating ill-treatment, that they were really necessary for the wife's protection ; *Brown v. Ackroyd*, 5 E. & B. 819 ; and in *Rice v. Shepherd*, 12 C. B. N. S. 332, where a solicitor took proceedings in the Divorce Court on behalf of a wife against her husband for judicial separation on the ground of adultery and cruelty, which proceedings were afterwards stayed, but would, if the petition had been proved, have led to a decree in her favour, it was held that the solicitor might sue the husband for the costs incurred, although the course prescribed by the practice of the Divorce Court for obtaining the wife's costs had not been pursued.

In *Re Hooper*, 33 L. J. Ch. 300, however, the Lords Justices held that the costs of a solicitor employed by a wife to take proceedings to obtain a judicial separation for her were not, under the circumstances of the case, necessities for which the husband was liable, as the proceedings, though they led to a compromise, were, in fact, groundless, and the wife's demeanour when she applied to the solicitor had been such as to show that she was probably insane, and to render it his duty to exercise great caution before acting upon her representations, a duty which he had not performed. *Turner*, L.J., appears, in this case, to have thought that *actual success* in the Divorce Court was necessary to entitle the solicitor to recover from the husband, even though he might have made all proper enquiries, and have had in the first instance reasonable grounds for instituting the suit. But the wife's right is to *protection*, and there may well be cases ultimately unsuccessful, yet in which there was reasonable ground for proceeding, and in which it was just that

the relative rights of the parties should be investigated. See Lord Campbell's judgment in *Brown v. Ackroyd*, to which the Lord Justice does not appear to have given full effect.

In *Wilson v. Ford*, L. R. 3 Ex. 63, the court extended the principle of *Brown v. Ackroyd* beyond expenses merely necessary for protection, and upheld a verdict making the estate of the husband, who had deserted his wife but died pending her suit for restitution of conjugal rights, liable for costs incidental to such suit, and also for the costs of obtaining professional advice as to dealing with tradesmen who threatened actions in respect of necessities supplied to the wife, and with the landlord who threatened a distress for the rent of the house in which she lived.

Brown v. Ackroyd extended by *Wilson v. Ford*.

In *Stocken v. Patrick*, 29 L. T. 507, costs as between solicitor and client incurred in a divorce suit which ended in a separation deed made between the husband and wife were recovered as necessities from the husband; and in *Ottaway v. Hamilton*, 3 C. P. D. 393, the wife's solicitor recovered as necessities the extra costs as between solicitor and client, which had been reasonably incurred in a successful divorce suit brought by the wife; and the fact that these costs had been disallowed on taxation in the Divorce Court was held immaterial.

Stocken v. Patrick.

Ottaway v. Hamilton.

In *Taylor v. Hailstone*, 47 L. T. 440, Mathew, J., in holding that the costs of the wife's suit for judicial separation were under the circumstances not necessities, was of opinion that it is not enough for her solicitor to show that he had reasonable grounds for supposing that the proceedings ought to be taken, and that "unless the necessity for the proceedings is made out in point of fact the husband cannot be made liable."

Taylor v. Hailstone.

A person who advances money to the wife for the prosecution of her husband for assaulting her cannot recover it as a necessary, for it cannot be necessary for her safety to prosecute him; since, by having him bound over to keep the peace, she may secure herself against ill-treatment; *Grindell v. Godmond*, 5 A. & E. 755. Nor is a counterpart of a deed of separation a necessary; *Ladd v. Lynn*, 2 M. & W. 265.

Not costs of prosecution of husband;

or of counterpart of separation deed.

Even in cases where the husband would be liable for necessities supplied to the wife, he is not liable *in law* for money lent to her, and applied by her in procuring necessities; *Knox v. Bushell*, 3 C. B. N. S. 334; *secus*, in

Husband not liable in law for money lent for necessities. *Secus*, in equity.

Effect of
husband's
insanity.

equity, *Deare v. Soutten*, 9 Eq. 151 ; and the rule of equity now prevails under the Judicature Act, 1873, s. 25, sub-s. 11.

The obligation of the husband to maintain his wife being a duty imposed by the law, and resulting from the relation between them, does not cease upon the husband's becoming insane. If the wife is not provided for, he is liable for necessities supplied to her in the same way and on the same grounds as a sane husband ; *Read v. Legard*, 6 Exch. 636 ; but if she is provided for he is not liable ; for his liability is not increased by his insanity ; *Richardson v. Dubois*, L. R. 5 Q. B. 51. In *Davidson v. Wood*, 32 L. J. Ch. 400, where a husband became lunatic, and his wife, who was entitled to separate property, borrowed money on his credit for the expenses of her removal with him to London (where he was placed in an asylum), and of her own maintenance in the neighbourhood, the persons who lent the money were held entitled in equity to claim the amount against the husband's estate on his death. In *Drew v. Nunn*, 4 Q. B. D. 661, the husband, after giving his wife actual authority, and also holding her out to the plaintiff as having his authority, to pledge his credit, became insane. During his insanity the wife ordered goods of the plaintiff, who had no notice of the insanity. The husband afterwards recovered his reason, and revoked his wife's authority. In an action against the husband for the goods supplied to the wife during his insanity, he contended that his insanity revoked his wife's authority ; but he was held liable on the ground that the revocation of agency, if it did take place by reason of the insanity, had not been communicated to the plaintiff. It seems uncertain how far insanity constitutes a defence to a petition for divorce ; see *Hanbury v. Hanbury*, (1892) P. 222.

Effect of hus-
band's death.

There is a case of *Smout v. Ilbery*, 10 M. & W. 1, in which a wife who had authority to bind her husband by contracting for necessities, and who contracted after his death, but before the intelligence of it had, *or could have*, reached her, was held not to be personally responsible. It was in that case also said to follow from the decision in *Blades v. Free*, 9 B. & C. 167, that the personal representative of the husband would not be responsible, a decision which would be obviously unjust, and might be easily avoided by holding the authority to extend so far as to enable the wife in such case to bind the representative. "Pareillement," says Pothier, "quoique le mandat finisse par la mort de celui qui

le donne, et qu'il paraisse répugner que je puisse être cense avoir contracté par le ministère de celui qui, depuis ma mort, a contracté en mon nom, néanmoins s'il a contracté en mon nom depuis ma mort, mais avant *qu'elle pût être connue* dans le lieu où le contrat s'est fait, ce contrat obligera ma succession, comme si j'avais effectivement contracté par le ministère de ce procureur ;" Pothier, Trait. Obl. part 1, chap. 1, art. v. pl. 81 ; see also Story on Agency, ss. 488—498.

ROE v. TRANMARR.

HILARY—31 GEO. 2, C. P.

[REPORTED WILLES, 682.]

A., in consideration of natural love, and of 100*l.*, by deeds of lease and release, *granted*, released, and confirmed certain premises, *after his own death*, to his brother B., in tail, remainder to C., the son of an uncle of A., in fee; and he covenanted and granted that the premises should, after his death, be held by B. and the heirs of his body, or by C. and his heirs, according to the true intent of the deed. Held, that the deed could not operate as a release, because it attempted to convey a freehold *in futuro*; but that it was good as a covenant to stand seised (*a*).

A SPECIAL case was reserved on the trial of this ejectment at the assizes at York. By deeds of lease and release, dated the 9th and 10th of November, 1733, Thomas Kirkby, in consideration of natural love to his brother, Christopher Kirkby, and of 100*l.*, *granted*, released, and confirmed to Christopher Kirkby the premises in question, *after the death* of Thomas Kirkby, to hold to the said C. Kirkby, and the heirs of his body; and after their decease to John Wilkinson (the lessor of the plaintiff), eldest son of his (the grantor's) well-beloved uncle, John Wilkinson, and his heirs and assigns, and to the only proper use of the said J. Wilkinson, the younger, "his executors, administrators, or assigns for ever;" he the said J. Wilkinson, the younger, paying to the child or children of his (the grantor's) brother, Stephen Kirkby, 200*l.* (and for want of such children, to other nephews and nieces therein mentioned); and for want of such children, the estate was to be free from the payment of the sum of 200*l.* The release contained covenants from the grantor, that he was seised in fee of the premises in question; and that it should be lawful for Christopher Kirkby, or J. Wilkinson, the younger, after his (the grantor's) death, peaceably and quietly to hold, &c. And it was thereby covenanted, *granted*, and agreed, by and

(*a*) S. C., 2 Wils. 75.

between the said parties, that all fines, recoveries, and other assurances of the said premises already levied, suffered, and executed by and between the said parties, should enure to and for the only use and behoof of Christopher Kirkby, and the heirs of his body ; and for want of such issue, to the proper use and behoof of John Wilkinson the younger, his heirs and assigns for ever, according to the true intent and meaning of those presents. At the time of executing the deeds, Christopher Kirkby paid 20*l.*, part of the consideration, in money, and gave his note for the remainder : and a receipt was signed by T. Kirkby for the whole sum. T. Kirkby continued seised of the premises in question until his death in 1744. Christopher Kirkby died in 1740, without issue. J. Wilkinson, the lessor of the plaintiff, had no notice of the deeds of lease and release until a short time before the ejectment was brought.

The case was argued on the 9th of February, 1756, by *Willes*, Serjt., for the plaintiff, and *Poole*, Serjt., for the defendant ; a second time on the 25th of June, 1756, by *Hewitt*, Serjt., for the former, and *Prime*, Serjt., for the latter ; and again a third time on the 23rd of June, 1757, by *Hewitt*, Serjt., and *Prime*, Serjt. And

WILLES, Lord Chief Justice, now delivered the opinion of the court, as follows, first stating the case :—

It is admitted that this deed will not operate as a release, because it grants a freehold *in futuro*, which cannot be done. The only question, therefore, is, whether, in respect to John Wilkinson, the lessor of the plaintiff, it can operate as a covenant to stand seised ? If it can, he ought to recover in this suit ; if it cannot, judgment must be for the defendants.

A great many cases were cited in the argument of this cause, and to be sure there are a great number of cases not quite consistent with one another upon this question, what shall amount to a covenant to stand seised ? But, as I think that this case rather depends upon the general reason of the law, and some particular rules that have been laid down in respect to covenants to stand seised, I shall not go through all the cases that have been cited, but shall only mention some few of them as authorities in point for the opinion which I am going to give, and two or three that were cited on the other side, to show that the

judgment which we are going to give does not clash with any of them.

And we are all of opinion (for my Brother Bathurst, though absent, has given me leave to say that he is of the same opinion with us), that this deed of release may operate as a covenant to stand seised.

And first we found our opinion on the general rules of law, in respect to the exposition of deeds, which are laid down in many of the books, and which are collected out of them by Sheppard on Common Assurances, pp. 82 and 86; in which he says that *benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat*, and that *verba intentioni, non e contra, debent inservire*. And therefore (he says) that deeds, which are intended and made to operate one way, may operate another way, if the intention of the parties cannot take place, unless they operate a different way from what they were intended; and he puts these instances (amongst others), that a deed intended for a release, if it cannot operate as such, may amount to a grant of a reversion, an attornment, or a surrender, and so *e converso*. And that if a man make a feoffment in fee with a letter of attorney to give livery, and no livery is given, but there is in the same deed a covenant to stand seised to the uses of the feoffment, if this be in such a case where there is a consideration sufficient to raise the uses of the covenant, it will amount to a covenant to stand seised. In the case of *Crossing v. Scudamore* (b), which I shall mention more particularly by and by, L.C.J. Hale cites the opinion of Lord Hobart, in fo. 277, and declares himself to be of the same opinion, that the judges ought to be curious and *subtle* (Lord Hobart used the word *astuti*) to invent reasons and means to make acts effectual according to the just intent of the parties. And it is said in the case of *Osman v. Sheafe* (c), which I shall have occasion likewise to mention again presently, that the judges in these later times (and I think very rightly) have gone farther than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it. These are the general reasons that we go on: and we think

(b) 2 Lev. 9; 1 Ventr. 137; and 1 Mod. 175.

(c) 3 Lev. 370; and Carth. 307.

that all the particular rules that have been laid down in respect to covenants to stand seised concur in the present case. I know of no others but these.

1st. That there must be a deed.

2nd. That there be words sufficient to make a covenant.

3rd. That the grantor or covenantor must be actually seised at the time of the grant.

4th. That the intent of the grantor must be plain.

5th. That there be a proper consideration to raise the use.

First. This is certainly a deed ; and, though it cannot operate as a release, it being signed, sealed and delivered by the party, does not cease to be a deed.

Secondly. That there are sufficient words to make a covenant I shall show more particularly by and by ; but if there were no other word but the word *grant*, that would be sufficient according to all the cases.

Thirdly. It is admitted, and so stated in the case, that the grantor, Thomas Kirkby, was actually seised at the time of the grant.

Fourthly. Nothing can be more plain than that the grantor intended that the lessor of the plaintiff should have the estate after the death of Christopher Kirkby without issue ; it is said so in express words in three places in the deed ; what estate he was to take is not material at present, he being still living.

Fifthly. Here is a plain consideration as to Wilkinson, the lessor of the plaintiff ; he is called in the deed eldest son of his well-beloved uncle, John Wilkinson. If it were not so said in the deed, his relation to the grantor might be averred and proved, according to the case of *Goodtitle v. Petto*, 2 Stra. 935, and several cases that are there (d) cited out of Lord Coke's reports.

Having mentioned the general reasons and likewise the particular rules on which we found our opinion, I shall now mention some few cases which I think are authorities in point. I shall not take notice of the ancient cases, because of late the courts of law have gone much farther in the determination of this question, and likewise because there are several rules laid down in those ancient cases which are not now adhered to. But I shall begin with the case of *Crossing v. Scudamore*, Tr. 23 Car. 2, in B. R. ;

(d) And *Filmer v. Gott*, 4 Bro. P. C. 230 ; and *R. v. Scammonden*, 3 T. R. 474.

and T. 22 Car. 2, in Cam., Scac., reported in 1 Mod. 175, 2 Lev. 9, and 1 Ventr. 137 [2 Keb. 784]; *Coultman v. Senhouse*, E. 30 Car. 2, B. R., Sir T. Jon. 105; *Walker v. Hall*, 23 Car. 2, in Scac., 2 Lev. 213; *Harrison v. Austin*, Tr. 3 J. 2, B. R., Carth. 38, 9; *Baker v. Lade*, B. C., H. 2 W. & M., 3 Lev. 291; and *Osman v. Sheafe*, 3 Lev. 370, 5 W. & M., B. C. (His Lordship here stated and commented upon the cases.) These are all the authorities that I shall mention for the opinion that I am going to give, and I think that these are sufficient.

But, before I give the judgment of the court, I shall take notice of some objections that were made on the part of the defendants, and two or three cases that were cited to support them.

1st. It was objected that the lessor was no party to the deed: but, to be sure, this is no objection. It is not necessary that a person taking under a deed should be a party; remainders are most commonly limited to persons who are not parties, and especially in covenants to stand seised.

2ndly. That there was no consideration as to Wilkinson; but this I have answered already.

3rdly. That it was intended to be a deed at common law, and therefore cannot operate by the Statute of Uses. This is founded on the *dictum* in Co. Lit. 49: "Where a man hath two ways to pass lands, and both be by the common law, and he intendeth to pass them by one of the ways, yet *ut res magis valeat* it shall pass by the other. But where a man may pass lands either by the common law or by raising of an use and settling it by the statute, there in many cases it is otherwise." But that rule has not been observed for above a hundred years last past; and most of the cases cited are determined contrary to that rule. Nor does Lord Coke lay it down as a general rule; but he only says that it is so in *many* cases. And Sheppard, in his book of Common Assurances, which I have already mentioned, who has *verbatim* transcribed the words of Lord Coke, puts a case, which I have already mentioned, directly contrary to this rule.

4thly. The next objection was, that the deed was void, and cannot operate at all. If by this be meant void as such a deed which it was intended to be, all the cases are against the objection. If it were meant a void deed, this, as I have already shown, is not so, it having been duly executed by the grantor.

5thly. But the main objection, and which the cases (of which I shall take notice) were cited to support, was, that no estate passed by this deed to Christopher Kirkby, out of whose estate the other estates are to arise; and it is admitted that he can take no estate by this deed. To support this objection were cited *Atwaters v. Birt*, 43 Eliz., B. C., Cro. Eliz. 856; *Hore v. Dix*, H. 12 Car. 2, B. C., 1 Sid. 25; and *Samon v. Jones*, 2 Vent. 318. If this objection had not been so solemnly determined in these cases to be a good one, I own I should have been of another opinion; because, in a covenant to stand seised, the estate properly arises out of the estate of the grantor, and his intent that it should not (I think) signifies nothing. For though his intent is to be regarded, *what estate* is to pass, *and to whom*, I do not think it is at all to be regarded *as to the manner* of passing it (of which he is supposed to be ignorant); if it were, it would overturn almost all the cases. But I choose, rather than contradict such great authorities, to distinguish the present case from them, and I think it is plainly distinguishable. For, in the present case, the estate to Wilkinson could not be to arise out of the estate of Christopher Kirkby; 1st, because he was intended only to have an estate for life, or at most an estate-tail, and, 2ndly, because the lessor's estate is not to commence until after the estate granted to Wilkinson (e).

There is likewise one thing in the present case much stronger than in any of the cases that have been cited on the one side or the other; for here is not only the word *grant*, which has been often construed as a word of covenant, but likewise the grantor expressly covenants in two places in the deed, that the estate shall go to John Wilkinson in such manner as he has granted it.

For these reasons we are all of opinion that this deed will amount to a covenant by the grantor to stand seised to the use of John Wilkinson, and that therefore he ought to have the benefit of the verdict and may enter up judgment upon it.

(e) *Sic* in the original, but this must be a mistake for *Christopher Kirkby*.

THE principle which this case carries out, and is usually cited to illustrate, is one of the highest importance, and is indeed the main one upon which the construction of every

Instances of construction
ut res magis valeat quam pereat.

written instrument hinges. It is expressed in the two maxims,—*Quando res non valet ut agas valeat quantum valere potest*, and *Benigne faciendæ sunt interpretationes chartarum propter simplicitatem laicorum ut res magis valeat quam pereat*. Thus, a deed of bargain and sale, void for want of inrolment, will operate as a grant of the reversion; see Preston's note to Shep. Touch. 83; *Smith v. Frederick*, 1 Russ. 210; *Haggerston v. Hanbury*, 5 B. & C. 101; and see *Goodtitle v. Bailey*, 2 Cowp. 597, 600; *Gibson v. Minet*, 1 H. Bl. 569, 3 T. R. 481; *Doe v. Simpson*, 2 Wils. 22; *Perry v. Watts*, 3 M. & Gr. 775; see too *Chester v. Willan*, 2 Wms. Saund. 97 a, and the notes thereto; *Doe v. Salkeld*, Willes, 673; *Parkhurst v. Dormer*, Id. 332; Com. Dig., title *Parols*; *Wellesley v. Withers*, 4 E. & B. 750, 756; and *Boddington v. Robinson*, L. R. 10 Ex. 270.

Grantee's right of election.

Many instances of the application of this doctrine will be found in Sheppard's Touchstone, 81 *et seq.* For instance, "If divers join in a deed,—and some are able to make such a deed, and some are not able—this shall be said to be his deed alone that is able;" a familiar instance of which will be found in the note to *Moss v. Gallimore*, *ante*, vol. i., p. 511, in the case of a mortgagor and mortgagee making a lease jointly, which enures as the lease of one, and the confirmation of the other. So, "If a lease be made to one that is incapable and to others that are capable, in this case it shall enure only to him that is capable," &c. And it is further laid down in the same valuable work, Shep. Touch. 83, that "when a deed may enure to divers purposes, he to whom the deed is made shall have election which way to take it, and he may take it that way as shall be most for his advantage. . . . So if one have a rent out of land whereof I and my wife are jointly seised, and he doth by his deed, release, give, and grant this rent to me, I may use this as a release to extinguish the rent, or as a grant of the rent, as it may make most for my advantage. But where any inconvenience may grow by such an election, there the grantee shall not have an election, but it shall enure as it may." An instance of the application of this doctrine is to be found in *Doe v. Davies*, 2 M. & W. 511, which was decided on the authority of the principal case of *Roe v. Tranmarr*, and bears a good deal of resemblance to it.

Like construction applied to bye-laws.

The rule that instruments should be so construed that they may stand good rather than be defeated, is applicable not only to contracts, but also to the bye-laws of a corpora-

tion; see *Poulters' Co. v. Phillips*, 6 B. N. C. 314; and *R. v. Saddlers' Co.*, 30 L. J. Q. B. 186, 198 (reversed upon a different point, 32 Id. 337).

In the Bills of Exchange Act, 1882, it is provided that “in determining whether the signature on a bill is that of the principal or that of the agent by whose hand it is written, the *construction most favourable to the validity of the instrument* shall be adopted” (s. 26 (2)).

Bills of exchange.

There are several rules of construction adopted by the courts, subsidiary to the above doctrine, and for the purpose of carrying it out; as, for instance, that too much stress is not to be laid on the strict and precise meaning of words where the intention is manifest; for *Qui hæret in literâ hæret in cortice*, and *Verba intentioni debent inservire, non e contra*. Hence the power which the court exercises in marshalling the words of a written instrument so as to carry the intention into effect (see *Attoe v. Hemmings*, 2 Bulst. 281), as in those cases in which words have been distributed among different subjects *referendo singula singulis* (see *Cook v. Gerrard*, 1 Wms. Saund. 170, *et notas*). Nay, there are cases in which the very same words have been construed to bear different meanings in respect of the legal properties of different subject-matters, as in *Forth v. Chapman*, 1 P. Wms. 664, 667; see *Burton v. Barclay*, 7 Bing. 745, 749. So, where one writing contains two distinct instruments, *e.g.*, a lease and release, the court will read that first which must be looked on as the first in point of time, in order to accomplish the intention of the parties; 1 Freem. 251, 2 Mod. 252; see *Bredon's Case*, 1 Co. 76.

Subsidiary rules of construction.

Qui hæret in literâ hæret in cortice.

Referendo singula singulis.

The intention, however, in these cases, must be clear; for where a deed demised divers lands, reserving to the grantor “all royalties whatsoever to the said premises belonging or in anywise appertaining,” it was held that even if such a reservation could be pleaded as a grant by the lessee of a liberty to enter and kill game, yet, as the intention to make such grant did not appear clearly upon the deed, it could not be so construed; *Pannell v. Mill*, 3 C. B. 625. But where the intention appeared clear by a reservation of “liberty of hawking, hunting, fishing, and fowling,” to the grantors and to a stranger, it was held that, although it could not take effect as a reservation, yet it would operate as a new grant of the liberty mentioned and enure to the benefit of the stranger, although he was no party to the deed; *Wickham v. Hawker*, 7 M. & W. 63; see *Doe v. Lock*,

Intention must be clear.

2 A. & E. 705; *Durham R. Co. v. Walker*, 2 Q. B. 940; *Graham v. Ewart*, 11 Exch. 326, 346; *Sutherland v. Heathcote*, (1892) 1 Ch. 475.

Doctrine of
Cy-pres.

Hence, too, the doctrine of *Cy-près* (as it is called), the principle of which in wills is, that where there is a general and also a particular intention, and the particular intention cannot take effect, the words shall be so construed as to give effect to the general intention; see Preston's *Shep. Touch.* 87; and *per* Buller, J., 2 T. R. 254. For a discussion of the doctrine, see also *Lyons v. Bengal*, 1 App. Cas. 91; *Hampton v. Holman*, 5 Ch. D. 183, 190; *Re White*, (1893) 2 Ch. 41, with respect to charitable bequests.

Mala gram-
matica non
vitiat
chartam.

A further consequence of this rule is expressed in the maxim, *Mala grammatica non vitiat chartam*, and there have been cases, in which the word *and*, in furtherance of this doctrine, has been read *or*; see *Chapman v. Dalton*, Plowd. 289; 1 Inst. 225 a; and the cases cited in *Wingfield v. Wingfield*, 9 Ch. D. 658; and *Mersey Docks v. Henderson*, 13 App. Cas. 595, 603.

Entire instru-
ment must be
looked at.

Again, the construction must be made *on the entire instrument*, after looking, as the phrase is, at the four corners of it: *Ex antecedentibus et consequentibus fit optima interpretatio*: and *Verba posteriora, propter certitudinem addita, ad priora quæ certitudine indigent sunt referenda*; see 4 Leon. 248;

General words.

and a branch of this rule is, that general words may be restrained by the particularity of the recital; *Payler v. Homersham*, 4 M. & S. 423; *Simons v. Johnson*, 3 B. & Ad. 175; see *Ringer v. Cann*, 3 M. & W. 343; *Doe v. Dodd*, 5 B. & Ad. 689; *Beswick v. Swindells*, 3 A. & E. 868; *Boyes v. Bluck*, 13 C. B. 652; *Fazakerly v. McKnight*, 6 E. & B. 795; and *Haselgrove v. House*, L. R. 1 Q. B. 101; and the effect of general words confined, where an intention to confine it can be collected from the context.

Thus, where a manor to which an advowson was appendant was conveyed by deed, which also conveyed *a moiety of the advowson*, a moiety only was held to pass; *Moseley v. Motteux*, 10 M. & W. 533. Indeed, recitals may even in some cases amount to covenants; see *Farrall v. Hilditch*, 5 C. B. N. S. 840, and the authorities there cited. In *Lyall v. Edwards*, 6 H. & N. 337, a court of law dealing, under the Common Law Procedure Acts, with pleadings raising equitable questions, confined the general words of a release according to the real intention of the parties, although this intention did not appear on the deed itself. On similar

grounds a grant of "all the real estate whatsoever and where-soever now vested in him" has been held to pass only property in which the grantor was beneficially interested, and not to include property of which he was seised in trust for other persons; *Sidebotham v. Knott*, 26 L. T. 700; *Faussett v. Carpenter*, 2 Dow. & C., H. L. 232. In *Boddington v. Robinson*, L. R. 10 Ex. 270, an habendum to R. for life, to commence on a future day, was held to be controlled by prior words granting an estate for life *in præsentî*. In *Exp. Dawes*, 17 Q. B. D. 286, the following three rules on this subject were laid down by Lord Esher, and Lopes, L.J.:—

"If the recitals are clear, and the operative part is ambigu- Recitals.
ous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred." See also *per* Jessel, M.R., *Bentley v. Rotherham Board*, 4 Ch. D. 588, 592.

Another branch of this rule is comprised in the maxim, *Falsa demonstratio non nocet*. Thus, if one grant "all my meadow in D., containing ten acres," whereas it really contains 20, the 20 will pass; *Shep. Touch.* 248; and *accord*. *Llewellyn v. Jersey*, 11 M. & W. 183; *Bittleston v. Cooper*, 14 Id. 399; *Barton v. Dawes*, 10 C. B. 261; and *Travers v. Blundell*, 6 Ch. D. 436. In wills the maxim has frequently been acted on, that the name shall prevail against an error of demonstration (see *Cloak v. Hammond*, 34 Ch. D. 255); but then it must be shown, in the first instance, that there is an error of demonstration, for until this is done the rule *Veritas nominis tollit errorem demonstrationis* has no application; see *Drake v. Drake*, 8 H. L. C. 172. In that case a testator bequeathed property to his "niece, Mary Frances T. D." He had no niece who bore these names; but he had a *sister-in-law* who bore them all, and four nieces who each of them bore some of them with the addition of another name. Under these circumstances the bequest was held to be wholly void for uncertainty, there being no *veritas nominis* to lay the foundation for extrinsic evidence of intention. Further, if there be a subject-matter, which answers to every particular of the description, no part of the description can be rejected so as to make it include a larger subject-matter, the rule being, "*Non accipi verba debent in demonstrationem falsam quæ competunt in limitationem veram*;" *Webber v.*

*Falsa demon-
stratio non
nocet.*

*Drake v.
Drake.*

Stanley, 16 C. B. N. S. 698; *Smith v. Ridgway*, 35 L. J. Ex. 198; *Re Seal*, (1894) 1 Ch. 316.

Repugnant
clauses.

Again, every word in an instrument ought, if possible, to operate, and subsequent words should not defeat prior ones, if they may stand together; Hard. 94; 6 Mod. 107. "The law will rather invert the words than pervert the sense;" Bacon's Law Tracts, Case of Revocation of Uses. Still, if there be words repugnant and plainly at variance with the general intention of the instrument, they shall be rejected; *Crowley v. Swindles*, Vaugh. 173; *Sims v. Doughty*, 5 Ves. 243; *Furnivall v. Coombes*, 5 M. & Gr. 736; *Salmon v. Duncombe*, 11 App. Cas. 627. And if two clauses be plainly at variance, the former stands; Hard. 94; 6 Mod. 107; Shep. Touch. 88; 2 Taunt. 113; see *Boddington v. Robinson*, L. R. 10 Ex. 270; though it is otherwise in wills; *Doe v. Biggs*, 2 Taunt. 109; *Sherratt v. Bentley*, 2 M. & K. 149; and in acts of parliament; *A.-G. v. Chelsea W. W.*, Fitzg. 195. If, however, the contradiction be of such a description as to render the intention of the instrument wholly uncertain and insensible, it will be void; 2 And. 103; 1 Inst. 20 b; *Thomas v. Thomas*, 6 T. R. 671, 676; *Doe v. Fleming*, 5 Tyr. 1013; *Doe v. Carew*, 2 Q. B. 317.

Presumption
against inten-
tion to con-
travene law,
or create
forfeiture.

A party cannot, without the very strongest evidence, be supposed to intend to contravene the rules of law, or to create a forfeiture; see *Croft v. Lumley*, 5 E. & B. 648, 682, 6 H. L. C. 672; and, therefore, if either of those consequences would follow from giving a particular construction to the instrument, such a construction should, if possible, be rejected; Co. Litt. 42, 183; 2 Bl. Com. 379; Shep. Touch. 88; see also *ante*, vol. i., p. 371. *Ubi quid generaliter conceditur, inest hæc exceptio, si non aliquid sit contra jus fasque*; 11 Rep. 78 b; see *Poulters' Co. v. Phillips*, 6 B. N. C. 314; and compare *Re Hallett*, 13 Ch. D. 727, *per* Jessel, M.R.: "Where a man does an act which may be rightfully performed, he cannot say that the act was intentionally and in fact done wrongly."

Contempo-
ranea expositio
fortissima est
in lege.

Ancient instruments may be construed by ancient usage, for so the parties to them must be supposed to have intended: *Contemporanea expositio fortissima est in lege*; 2 Inst. 136; *per* Lord Hardwicke, 3 Atk. 577; see Bro. Abr. *Grants*, 89; 2 Bulst. 298; and *ante*, vol. i., p. 255. But it seems that no usage can affect plain and unequivocal language; though even in the construction of an act of parliament expressive as to some points, and silent as to others,

usage not inconsistent with the express terms of the statute is of weight; see *Dunbar v. Roxburghe*, 3 Cl. & F. 335; *Jones v. Phillips*, 7 Exch. 85; *Shrewsbury v. Scott*, 6 C. B. N. S. 1.

An evident omission or mistake may be supplied even at law; *Trethewy v. Ellesdon*, 2 Vent. 141; *Lloyd v. Saye and Sele*, 4 Bro. P. C. 73: see *Cholmondeley v. Clinton*, 2 B. & Ald. 625; *Spyve v. Topham*, 3 East, 115; *R. v. Exminster*, 6 A. & E. 598; and *Lyall v. Edwards*, 6 H. & N. 337. For a remarkable case of an omission in a settlement deed supplied by a Court of Equity, see *Re Daniel*, 1 Ch. D. 375. Even a *blank* has been supplied when the context obviously required it; see the cases cited in *Holden v. Raphael*, 4 A. & E. 228; and *Hunt v. Bishop*, 8 Exch. 675. In *The goods of Boehm*, (1891) P. 247, probate of a will was granted with the omission of a wrong name which had been inserted by mistake for another name. On the construction of the will, in subsequent proceedings in Chancery before Chitty, J., the blank was supplied by reading in the right name.

Matter will sometimes be implied where the *intention* manifestly requires it; *Quando aliquis concedit, id etiam concedere videtur, sine quo ea res, quæ conceditur, esse non potest*; see *Hinchliffe v. Kinnoul*, 5 B. N. C. 1, *per* Tindal, C.J.; and *McIntyre v. Belcher*, 14 C. B. N. S. 654. But a stipulation will not be implied in a written contract, unless, on considering its terms in a reasonable manner, an implication necessarily arises that the parties must have intended that the stipulation should exist; it is not enough to say that it would be a reasonable thing to make such a stipulation; *The Moorcock*, 14 P. D. 64, 68; *Hamlyn v. Wood*, (1891) 2 Q. B. 488, 491.

Verba relata inesse videntur; see *Llewellyn v. Jersey*, 11 M. & W. 183; and Vin. Abr. tit. *Estate* (K. 2), 5: "If the father infeoff the son to have and to hold to him and his heirs, and the son infeoffs the father *as fully as* the father infeoffed him, by this the father hath a fee simple;" see also *Price v. Birch*, 4 M. & Gr. 1.

The words used in a deed are to be taken most strongly against the party using them: *Verba accipiuntur fortius contra proferentem*; for the law supposes that natural self-love will prevent a man from unnecessarily using language to his own disadvantage; see Co. Litt. 185; Cro. Car. 400; 2 Bl. Com. 379; *Fowkes v. Manchester & London Association*, 3 B. & S. 917; *Taylor v. Liverpool Co.*, L. R. 9 Q. B. 546, 549; and *Hayn v. Culliford*, 3 C. P. D. 410. But this is

Omissions and mistakes.

Implied stipulations.

Verba relata inesse videntur.

Verba accipiuntur fortius contra proferentem.

only to be carried as far as fair inference will allow; see 3 Ves. 48; and being a harsh rule, it must not be resorted to till other modes of exposition have been tried and failed; 2 Bl. Com. 379; Bac. El. Reg. 3; and there is a difference in this respect between a deed-poll and an indenture: the former being executed by the grantor alone, the words are his only; the latter being executed by both parties, the words are used by both; Plowd. 131. Another form of the above rule is, *Pactionem obscuram iis nocere quorum fuit in potestate rem apertius discere*. This rule is said by Lord Bacon "not to be resorted to unless all other rules of exposition fail:" and the learned and subtle Duer enumerates the rules which have precedence of it, thus: "*Verba generalia restringuntur ad habilitatem personæ vel aptitudinem rei,—Quoties idem sermo duas sententias exprimit ea potissimum accipiat quæ rei gerendæ aptior est,—In obscuris id quod minimum est sequimur,—Verba ita sunt intelligenda ut res magis valeat quam pereat,—Ex antecedentibus et consequentibus optima fit interpretatio,—are all prior in the order of their application to Verba fortius accipiuntur contra proferentem.*" 1 Duer, Marine Ins., 211.

In *Taylor v. St. Helens*, 6 Ch. D. 264, 270, Jessel, M.R., said: "I do not see how, according to the now established rules of construction, as settled by the H. L. in *Grey v. Pearson*, 6 H. L. C. 61, followed by *Roddy v. Fitzgerald*, Id. 823, and *Abbott v. Middleton*, 7 Id. 68, that maxim (*Verba fortius*, &c.) can be considered as having any force at the present day." But it has since been recognized in construing a charter-party; see *Burton v. English*, 12 Q. B. D. 218, where Brett, M.R., said: "The general rule is, that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made."

Right of election of party taking under ambiguous instrument.

Miller v. Green.

It has been already said that where a deed may operate in two ways, he to whom it is made may elect in which way he will have it operate. But the instrument ought, if pleaded, to be stated according to its legal effect, and the court not left to make the election. In *Miller v. Green*, 2 Tyr. 1, 2 C. & J. 142, 8 Bing. 92, which was an action of replevin, the defendant made cognizance, that, by deed of 25 Sept., 1806, T. granted H. a rent-charge on the premises, with power to enter and distrain for the arrears in the same manner as for rent reserved on leases for years; and that he, the defendant, as bailiff to H., entered and dis-

trained for arrears. The plaintiff pleaded in bar, that by a previous deed of 7th May, 1806, 'T. granted W. a rent-charge out of the same premises, and for better securing the payment, granted, bargained, sold, and demised them to F. for ninety-nine years, with power of distress, and that arrears had accrued and were due. It was held that, as the plea in bar did not aver an entry by F. under the deed of 7th May, 1806, no estate at common law appeared to have vested in him by that deed; and that, though an estate might have passed to him by way of bargain and sale, under the Statute of Uses, still, as he had not so pleaded it, the court could not make the election for him. It is true that in this case the party pleading the deed was (as far as appeared on the record) a stranger, and so the court observed. See also *Haigh v. Jaggar*, 16 M. & W. 525.

In *Pascoe v. Pascoe*, 3 B. N. C. 898, the plaintiff having brought replevin, the defendant avowed that the plaintiff held the premises as his tenant under a demise, at a rent of 32*l.* per annum, and avowed for 80*l.* arrears: plea in bar, that the demise passed the whole of the defendant's interest, without leaving him any reversion. Upon demurrer, at a subsequent stage of the pleadings, it was held that the plea in bar was not bad; for that, on the authority of *Preece v. Corrie*, 5 Bing. 24, it might admit a demise, yet set up an assignment: and though the defendant contended that the rent would, at all events, be a rent-seck, to which a power of distress would be incident by virtue of 4 G. 2, c. 28, yet the court said: "Although it is true that this rent may be a rent-seck, and that the remedy is the same under the statute for a rent-seck as for a rent-service, yet the avowry is for a rent-service at common law, and not for a rent-seck." *Pascoe v. Pascoe.*

See further, as to the necessity of pleading a deed according to its legal effect, the excellent note to *Chester v. Willan*, 2 Wms. Saund. 283, ed. 1871; *Wickes v. Gordon*, 1 Chitt. Rep. 60, 66; *Pollitt v. Forrest*, 11 Q. B. 949, 962; and *Wilson v. Braddyll*, 9 Exch. 718. See R. S. C., Order XIX., r. 21. Pleading deed according to legal effect.

VICARS v. WILCOCKS.

MICH.—47 GEO. 3, K. B.

[REPORTED 8 EAST, 1 (9 R. R. 361 .

Where special damage is necessary to sustain an action for slander, the special damage must, in order to sustain the action, be a legal and natural consequence of the slander.

Damage, to be actionable, must not be too remote.

IN an action on the case for slander, the plaintiff declared, that whereas he was retained and employed by one J. O., as a journeyman for wages, the defendant knowing the premises, and maliciously intending to injure him, and to cause it to be believed by J. O. and others, that the plaintiff had been guilty of unlawfully cutting the cordage of the defendant, and to prevent the plaintiff from continuing in the service and employ of J. O., and to cause him to be dismissed therefrom, and to impoverish him; in a discourse with one J. M. concerning the plaintiff, and concerning certain flocking-cord of the defendant alleged to have been before then cut, said that he (the defendant) had last night some flocking-cord cut into six-yard lengths, but he knew who did it; for it was William Vicars; meaning that the plaintiff had unlawfully cut the said cord. And so it stated other like discourse *with other third persons*, imputing to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard. By reason whereof the said J. O., believing the plaintiff to have been guilty of unlawfully cutting the said flocking-cord, &c., discharged him from his service and employment, and has always since refused to employ him; and also one R. P., to whom the plaintiff applied to be employed after his discharge from J. O., on account of the speaking and publishing the said slanderous words, and on no other account whatsoever, refused to receive the plaintiff into his service. And by reason of the premises the plaintiff has been and still is out of employ and damnified, &c.

It appeared at the trial before LAWRENCE, J., at Stafford, that

the plaintiff had been retained by J. O. as a journeyman for a year at certain wages, and that before the expiration of the year his master had discharged him in consequence of the words spoken by the defendant. That the plaintiff afterwards applied to R. P. for employment, who refused to employ him, in consequence of the words, *and because his former master had discharged him for the offence imputed to him*. The plaintiff was thereupon nonsuited; it being admitted that the words in themselves were not actionable without special damage; and the learned judge being of opinion that, the plaintiff having been retained by his master under a contract for a certain time then unexpired, it was not competent for the master to discharge him on account of the words spoken; but it was a mere wrongful act of the master, for which he was answerable in damages to the plaintiff; that the supposed special damage was the loss of those advantages to which the plaintiff was entitled under his contract with his master; which he could not in law be considered as having lost, as he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service. 2ndly, with respect to the subsequent refusal of R. P. to employ the plaintiff, that it did not appear to be merely on account of the words spoken, but rather on account of his former master having discharged him in consequence of the accusation; without which he might not have regarded the words.

Jervis now moved to set aside the nonsuit, and urged that it was always deemed sufficient proof of special damage in these cases to show that the injury arose in fact from the slander of the defendant, and it was not less a consequence of it because the act so induced was wrongful on the part of the master. He said that he could find no case where such a distinction was laid down, and that the practice of *Nisi Prius* was understood to be otherwise. 2ndly, That the refusal of R. P. to employ the plaintiff was clear of that objection; and that such refusal had proceeded upon the alleged cause of discharge by the first master, and not upon the bare act itself of discharge.

LORD ELLENBOROUGH, C.J., said that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration; and here it was an illegal

consequence (a) ; a mere wrongful act of the master, for which the defendant was no more answerable, than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horse-pond by way of punishment for his supposed transgression (b). And his lordship asked whether any case could be mentioned of an action of this sort sustained by proof only of an injury sustained by the tortious act of a third person. Upon the second ground, *non liquet* that the refusal by R. P. to employ the plaintiff was in consequence of the words spoken as it is alleged to be ; there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ, which was more likely to weigh with R. P. than the mere words themselves of the defendant.

The other judges concurring,

Rule refused.

(a) See, however, the cases cited in the note, *post*, pp. 512 *et seq.*

(b) See *post*, p. 514.

Instances of damage by defamation held too remote.

IN Comyns's Dig., *Action on the Case—Defamation*, the doctrine here asserted, namely, that damage under certain circumstances may be too *remote* to form the subject-matter of an action, will be found laid down ; and there are many modern cases in which the courts have acted upon it.

Kelly v. Partington.

In *Kelly v. Partington*, 5 B. & Ad. 645, a servant-maid sued the defendant for using certain words not actionable in themselves, but in consequence of which, it was stated, one Stenning had refused to engage her in his service. The court, however, held the action not to be maintainable, apparently upon the ground that the words were not of a description which would *naturally* lead to the result stated in the declaration to have been produced by them. "I have always," said Patteson, J., "understood *that the special damage must be the natural result of the thing done*. The words here are 'the plaintiff secreted 1s. 6d. under the till, stating, these are not times to be robbed.' . . . Then, it is said that the words are actionable, because a person, after hearing them, chose in his caprice to reject the plaintiff as a servant. But, if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the *natural result* of speaking the words. To make the speaking of the words wrongful, they must, in their nature, be defamatory."

In *Morris v. Langdale*, 2 B. & P. 284, the declaration stated that the plaintiff was a dealer in the funds, and that the defendant said of him, "*He is a lame duck*," meaning that he was incapable of fulfilling his contracts, in consequence of which divers persons refused to deal with him. The court held the declaration bad upon the ground that the plaintiff's contracts, which the words *lame duck* accused him of not fulfilling, might be unlawful ones; and if so, no special damage could arise from a charge that he had not done that which the law prohibits.

*Morris v.
Langdale.*

In *Ashley v. Harrison*, 1 Esp. 48, 1 Peake, 256, the declaration stated that the defendant had published a libel on Madame Mara, in consequence of which she refused to sing (as she had engaged to do) at the plaintiff's oratorio, from an apprehension of being hissed and ill-treated, whereby he lost the benefit of her services. Lord Kenyon held the action not maintainable. "The injury," he said, "was *too remote*, and impossible to be connected with the cause assigned for it. Her refusal to perform might have proceeded from groundless apprehension; and the plaintiff was not at liberty to suggest the libel as the cause of that injury, which might have proceeded from another cause, or perhaps from caprice or insolence." See also *Taylor v. Neri*, 1 Esp. 386, where it was held that a manager of a theatre could not sustain an action for beating a performer *per quod servitium amisit*. It may be a question whether these cases are reconcilable with *Lumley v. Gye*, 2 E. & B. 216 (*ante*, vol. i., p. 281), which latter case was affirmed by the C. A. in *Bowen v. Hall*, 6 Q. B. D. 333; *Temperton v. Russell*, (1893) 1 Q. B. 715; and *Flood v. Jackson*, (1895) 2 Q. B. 21; see *Société Française des Asphaltes v. Ferrell*, C. & E. 563.

*Ashley v.
Harrison.*

*Taylor v.
Neri.*

In *Chamberlain v. Boyd*, 11 Q. B. D. 407, the statement of claim alleged that the plaintiff was a candidate for membership at the Reform Club, but upon a ballot was not elected; that a meeting of the members was called to consider an alteration of the rules regarding the election of members; that the defendant falsely and maliciously spoke and published of the plaintiff certain words whereby the defendant induced a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the club. On demurrer the statement of claim was held bad by the C. A. (following *Lynch v. Knight*, *post*, p. 512), as not disclosing, (1) damage in

*Chamberlain
v. Boyd.*

Wife's illness
caused by
slander too re-
mote in action
by husband.

respect of which the law would allow an action to be brought, or (2) damage sufficiently proximate to sustain the action.

See also *Allsop v. Allsop*, 5 H. & N. 534 (recognized in the H. L. in *Lynch v. Knight*, *post*, p. 512), where, in an action by a husband and wife for slander, imputing incontinency to the wife, and alleging that by reason thereof she became ill and unable to attend to her business, and that the husband was put to expense in endeavouring to cure her, it was held (the words not being then in themselves actionable) that the special damage alleged was not sufficient to support the action. See *Weldon v. De Bathe*, 54 L. J. Q. B. 113, 116. In *Davies v. Solomon*, L. R. 7 Q. B. 112, however, the loss of hospitality of friends was held sufficient. See *Clarke v. Morgan*, 38 L. T. 354.

Damage
caused by
repetition
of slander
too remote.
Ward v.
Weeks.

In *Ward v. Weeks*, 7 Bing. 211, the declaration stated the defendant to have said of the plaintiff: "He is a rogue and a swindler: I know enough about him to hang him;" in consequence of which Bryer refused to sell the plaintiff certain goods. It turned out at the trial that the words were spoken to Bryce, and communicated by him to Bryer, who thereupon refused to trust the plaintiff: upon this the plaintiff was nonsuited. On a motion to set aside the nonsuit, it was urged that Bryce was the mere conduit-pipe of the slander; but the court thought that, Bryce being a free agent, his repetition of the defamatory words to Bryer was a wrongful act, for which he, and not the defendant, should be answerable, and they discharged the rule. "Every man," said Tindal, C.J., "must be taken to be answerable for the necessary consequences of his own wrongful acts. But such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original uttering of the words; for no effect whatever followed from the first speaking of the words to Bryce: if he had kept them to himself, Bryer would still have trusted the plaintiff. It was the repetition of them by Bryce to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage. We think, therefore, that, as each count in the declaration alleges, as the only grievance, the original false speaking of the words, the allegation that 'by reason of the committing of such grievance Bryer refused to give the plaintiff credit' is not made out by the evidence, and on this ground we think the nonsuit is right."

The rule laid down in this case, namely, that a man is not liable for the consequences of an unauthorized repetition of words spoken by him which are not actionable in themselves is now well established; *Parkins v. Scott*, 1 H. & C. 153; *Tunncliffe v. Moss*, 3 C. & K. 83; *Dixon v. Smith*, 5 H. & N. 450; *Bateman v. Lyall*, 7 C. B. N. S. 638; *Clarke v. Morgan*, 38 L. T. 254; *Bree v. Marescaux*, 7 Q. B. D. 434. A late case on the subject is *Speight v. Gosnay*, 60 L. J. Q. B. 231, where the C. A. held that the defendant was not liable in respect of words not then actionable in themselves, which he uttered to the plaintiff's mother, and the repetition of which by the mother caused the plaintiff's marriage engagement to be broken off.

This rule does not apply, however, when the repetition is authorized or intended; *Parkes v. Prescott*, L. R. 4 Ex. 169; or when it is the natural consequence of the defendant's act; *Whitney v. Moignard*, 24 Q. B. D. 630; or where the person to whom the words are spoken is under a legal or moral obligation to repeat them to a particular person, and does so accordingly; *Derry v. Handley*, 16 L. T. 263; *Kendillon v. Maltby*, Car. & M. 402, as to which case see *Munster v. Lamb*, 11 Q. B. D. 588. In all these cases the defendant is liable and the action will lie; *Speight v. Gosnay*, *supra*, per Lopes, L.J.

Exceptions to
above rule.

In *Riding v. Smith*, 1 Ex. D. 91, a hope was expressed by Kelly, C.B., that "the day will come when the principle of *Ward v. Weeks* and that class of cases shall be brought under the consideration of the court of last resort, for the purpose of determining whether a man who utters a slander in the presence of others is not responsible for all the natural effects which will arise from those persons going about and repeating the slander, though without any express authority on his part." That was an action by a grocer for damages in that the defendant stated in the hearing of divers persons that the plaintiff's wife, who assisted him in carrying on his business, had been guilty of adultery, so that customers ceased to deal at the plaintiff's shop. He was held entitled to recover, and that upon proof merely of general loss of custom, without proving that any particular customer had been deterred from dealing with him. So, in an action in respect of falsehoods published about a man's business, evidence of general loss of business is admissible and sufficient; *Ratcliffe v. Evans*, (1892) 2 Q. B. 524. See also *Evans v. Harries*, 1 H. & N. 251.

Riding v.
Smith.

Lord Ellenborough's rules in principal case have been doubted.

Lynch v. Knigh.

It must be mentioned that serious doubts have been expressed by high authorities as to the accuracy, in some respects, of the rules laid down by Lord Ellenborough in the principal case. In *Lynch v. Knight*, 9 H. L. C. 577, an action was brought in the Q. B. in Ireland, in the names of Knight and his wife (the former being joined for conformity), in respect of slanderous words spoken of the wife, and imputing to her unchastity; the words complained of were not then actionable in themselves (see now the Slander of Women Act, 1891), and the declaration alleged, as special damage, that the husband, believing that the slanderous statements were true, had refused to live with his wife, and had sent her away. The judges in Ireland differed as to whether the action was maintainable or not, and on appeal to the H. L. several questions of great interest were discussed, and some important observations were made on *Vicars v. Wilcocks*, to which it is necessary to refer.

Per Lord Campbell.

Lord Campbell was of opinion that the action was not maintainable on the facts shown by the plaintiff, because the loss or special injury relied upon was not shown to be the natural and probable consequence of the speaking of the slanderous words. He thought that if the slander had imputed adultery to the wife, and the husband, believing it to be true, had therefore separated from her, this separation would have been the natural, direct, and probable consequence of the slander; but, examining the specific words set out in the plaint, he thought that no charge of adultery was made in them, nor did they contain any imputation which, if true, would induce any reasonable man to act as the husband was alleged to have acted. Lord Campbell added: "*I place no reliance upon the objection that in a case like the present, the imputation cast on the wife being false, the act of the husband in separating from her is wrongful, and therefore he cannot join as plaintiff in an action, the foundation of which is his own wrongful act. If his dismissal of his wife from his house would have been reasonably justified had the words spoken been true, and this act was a natural, probable, and direct consequence of the imputation, I do not think that the defendant could avail himself of the objection of the imputation being false, he having intended the husband to believe that it was true, and having intended the husband to act upon it. . . . From some expressions of Lord Ellenborough in *Vicars v. Wilcocks*, it is argued that such an action will not lie where the act is wrongful as between*

the party who does the act and the party to whom it is done. But, if there be any error in that case, I think it was in supposing that the offence imputed to the servant, even if he had been guilty of it, would not have justified his master in dismissing him from his service. *I do not consider Lord Ellenborough to have held that, although the imputation, if true, would have justified the dismissal, the action would not lie, because the imputation was false, and the dismissal was wrongful.*"

Lord Brougham agreed in this view of the meaning and effect of the words complained of, but declined to express any opinion as to what would have been the effect of words imputing actual criminality. *Per Lord Brougham.*

Lord Cranworth also agreed in the opinions of Lord Campbell which have been mentioned above, except that he declined to express a decided opinion that a husband and wife may maintain an action against a slanderer for words not actionable in themselves, but occasioning special damage to her by depriving her of the *consortium* or conjugal society of her husband. *Per Lord Cranworth.*

Lord Wensleydale was of opinion, on general principles, that no action can be maintained by a wife against a third person for words occasioning to her the loss of the *consortium* of her husband, and this view rendered it unnecessary for him to consider whether the slander had been proved to be so directly the cause of her husband's desertion as to make the words actionable. He proceeded, however, to state his view upon this question (the question raised in substance in *Vicars v. Wilcocks*) in the following terms, which differ very materially, it will be observed, from the opinions expressed by Lord Campbell on this point: "Upon this question," said Lord Wensleydale, "I am much influenced by the able reasoning of Christian, J. (one of the judges in the court below). *I strongly incline to agree with him, that to make the words actionable, by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, or we might think ought to follow.* I agree with the learned judges (the judges below) that the husband was not justified in sending his wife away. I think he is to blame; but I think that such deliberate and continued accusations of such

Per Lord Wensleydale.

a character, coming from such a quarter, might reasonably be expected so to operate, and to produce the result which they did. In the case of *Vicars v. Wilcocks*, I must say that the rules laid down by Lord Ellenborough are too restrictive. That which I have taken from Christian, J., seems to me, I own, correct. I cannot agree that the special damage must be the natural and legal consequence of the words, if true. Lord Ellenborough puts as an absurd case, that a plaintiff could recover damages for being thrown into a horse-pond, as a consequence of words spoken; but I own I can conceive that when the public mind was greatly excited on the subject of some base and disgraceful crime, an accusation of it to an assembled mob might, under particular circumstances, very naturally produce that result, and a compensation might be given for an act occurring as a consequence of an accusation of that crime."

Other doubts.

In *Knight v. Gibbs*, 1 A. & E. 43, and *Green v. Button*, 2 C. M. & R. 707, some doubts were expressed as to the correctness of the judgment in the principal case.

*Green v.
Button.*

In *Green v. Button*, the declaration stated that the plaintiff was a carpenter, and had bought of C. & Son 200 battens for 11*l.* which he had borrowed from the defendant and paid to C. & Son; that the defendant, falsely and wrongfully pretending that he had a *lien* on the battens for this sum, directed C. & Son not to deliver them to the plaintiff without his (the defendant's) orders; that C. & Son complied with this direction, and plaintiff thereby lost the benefit of the battens. The plea denied the payment of the 11*l.* to C. & Son; and, on demurrer to it, the declaration was impugned on the authority of *Vicars v. Wilcocks* and *Morris v. Langdale*. The court, however, held that, if C. & Son had not been paid (and the plea traversed the payment), it was not clear that their refusal to deliver the battens was unjustifiable, and, if not, it might be assigned as special damage arising from defendant's false representation, without impugning the authority of *Vicars v. Wilcocks*. Parke, B., in delivering judgment, said: "*Vicars v. Wilcocks*, and Lord Eldon's *dictum* in *Morris v. Langdale*, are cited to show that the plaintiff's right of action against them (C. & Son) bars him from recovering against the defendant: it is not necessary to consider how far those cases would be supported, if the same question arose directly; if it did we should desire time to give them a full consideration, some doubt having been thrown upon their authority."

The work to which his lordship alluded, as having cast some doubt on the authority of *Vicars v. Wilcocks*, is Mr. Starkie's excellent "*Law of Slander and Libel*," 2nd ed., p. 205 (5th ed., p. 370), where the following observations will be found:—

Vicars v. Wilcocks questioned in Starkie on Slander.

"It has been said that where, in consequence of the words, a third person has refused to perform a contract previously made with the plaintiff, and which he is in law bound to perform, no action is maintainable, for the plaintiff is, in such case, entitled to a compensation for the non-performance of the contract; and, were he allowed to maintain his action for the slander, he would receive a double compensation for the same injury—first, against the author of the slander; and secondly, against the person who had refused to perform his agreement. This doctrine would, in many instances, be productive of hardship to the plaintiff: he may resort, it is true, to his legal remedy against the person refusing to perform his contract; but this can scarcely be considered as a full and real compensation to the party who by the defendant's wrongful act has had a benefit in possession wrested from him and converted into a bare legal right."

It may perhaps be urged that *Vicars v. Wilcocks* was decided, not so much on the ground that the plaintiff, if suffered to recover, would have obtained two compensations, as on the ground that the damage alleged by the plaintiff could not be considered the *natural* consequence of the defendant's act, since the law cannot esteem it natural that the repetition of a slander against the contractor should induce anyone to break his contract.

Still, it is difficult to answer the observation made by Mr. Starkie, in a note to the above passage, namely, that the doctrine laid down in *Vicars v. Wilcocks* is inconsistent with the cases in which an action has been maintained for slander, laying, as special damage, the loss of a marriage by a lady, to whom the party breaking off the match was under an engagement, and with the case of *Newman v. Zachary*, Aleyn, 3 (cited in the same note), where an action *on the case* was maintained for wrongfully representing to the bailiff of the manor that a sheep was an estray, in consequence of which it was wrongfully seized.

Cases at variance with *Vicars v. Wilcocks*.

Nor can it be easily reconciled with *R. v. Moore*, 3 B. & Ad. 184, where a defendant who had a shooting ground near a public highway was held to be liable for unlawfully *causing* persons armed with firearms to assemble outside to fire at stray pigeons; or with *R. v. Carlile*, 6 C. & P. 636,

where a defendant was held to be indictable for a nuisance for exhibiting effigies in his windows, thereby attracting a crowd and *causing* a footway to be interrupted, although the effigies might not be libellous; or with *Barber v. Penley*, (1893) 2 Ch. 447, where the lessee of a theatre was held liable for a nuisance caused by crowds of persons collecting outside the door of the theatre and obstructing the highway.

Bowen v. Hall.

In *Bowen v. Hall*, 6 Q. B. D. 333, 338, Brett, L.J., delivering the judgment of himself and Lord Selborne, in the C. A., observed: "It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognise that it is a natural or probable consequence of the defendant's act. If that were so held in all cases, the law would in some refuse to recognise what is manifestly true in fact. If the judgment of Lord Ellenborough in *Vicars v. Wilcocks* requires this doctrine for its support, it is, in our opinion, wrong."

Temperton v. Russell.

Again, in *Temperton v. Russell*, (1893) 1 Q. B. 715, the breach of a contract with a third party, and in *Flood v. Jackson*, (1895) 2 Q. B. 21, the wrongful discharge of a servant, brought about by the malicious persuasion of the defendant, were held to be damage for which an action could be maintained.

Suggestion
of the true
ground of
Vicars v.
Wilcocks.

Perhaps the true ground on which *Vicars v. Wilcocks* may be supported is, that there was, in reason and common sense, no connection between the imputation levelled at the plaintiff and the damage said to have been the result of it, any more than, in *Kelly v. Partington*, *ante*, p. 508, the rejection of the plaintiff as a servant could be considered the natural consequence of the words spoken of her by the defendant. That case shows that the words for which an action is maintainable must have, in common sense and reason, some connection with the damage said to have ensued from them; and that it is not enough that the unwarrantable caprice of some person has caused a damage to result from them which the speaker had no reason to apprehend. See *per* Brett, L.J., *Chamberlain v. Boyd*, 11 Q. B. D. 407, 414.

But, besides that, *Vicars v. Wilcocks* may be supported on the ground taken by the court in *Ward v. Weeks* (followed in *Clarke v. Morgan*, 38 L. T. 354); for the imputation was not uttered in a discourse either with J. O. or R. P., but in discourse with third parties who were free agents; and, had

not those third parties repeated it, the mischief never would have ensued; just as in *Ward v. Weeks* the damage was attributable, not to the defendant's discourse with Bryce, but to Bryce's repetition of it to Bryer. See, however, the observations of Kelly, C.B., as to the liability for repetition of slander in *Riding v. Smith*, ante, p. 511.

The principle acted upon in the principal case—namely, that the damage must be the natural and proximate consequence of the wrongful act complained of in the action—has been applied in many modern cases, other than actions for slander.

Same principle applied in actions of tort other than for slander.

In *Collins v. Cave*, 4 H. & N. 225, 6 Id. 131, it was held that a declaration, which charged the defendant with having made a fraudulent misrepresentation which induced a third person to sue the plaintiff, was bad on demurrer, as it did not show that the recovery in the action by the third person, and the resulting damage, was the consequence of the wrongful act of the defendant.

Collins v. Cave.

The same principle was acted upon in *Walker v. Goe*, 3 H. & N. 395, 4 Id. 350, where it appeared, upon a special case stated for the opinion of the court, that an Act, enabling navigation commissioners to grant a lease of a canal, contained a clause "authorising and requiring" them, in case the lessees should permit the navigation to be out of repair, to give a notice to the lessees specifying the necessary repairs, and requiring them to be done. The Act also "authorised" the commissioners to take possession of the tolls and cause the repairs to be done if the lessees neglected to obey their notice. The case showed that during the lease one of the canal locks became out of repair, to the knowledge of the commissioners; that they had, however, given no notice to the lessees; and that the plaintiff's barge, having entered the canal whilst the lock was out of repair, had been detained there by the falling in of the lock.

Walker v. Goe.

The Court of Exch. was of opinion, after expressing a doubt whether the Act imposed any duty on the commissioners to give notice to the lessees to repair, that, even assuming the existence of this duty, no action would, under the circumstances, lie against them, as it did not appear that the damage complained of had resulted from their conduct. This judgment was affirmed in the Exch. Cham., where Wightman, J., in delivering the judgment of the court, said: "Some members of this court are disposed to think that the judgment should be affirmed on the ground that the action is not maintainable: but we are all of opinion

that it must be affirmed on the ground assigned by the court below, *viz.*, that the damage was not the *proximate, necessary, or natural result* of the neglect of the commissioners to give notice. Assuming that it was their duty to give notice, the proximate cause of the damage was the falling in of the lock, and it was not the duty of the commissioners to repair it; they were only to put the lessee in motion, and for that purpose the Act enables them to give notice to the lessee in case he permitted the navigation or works to be out of repair. . . . But it is argued that if notice had been given the repairs would have been done, and if they had been done the lock would not have fallen in. Suppose, however, the commissioners had given notice, it does not follow that the lessee would have repaired, and, if he did not, the commissioners were not bound to repair. Therefore the falling in of the lock cannot be considered as the natural and necessary consequence of the omission of the commissioners to give the lessee notice to repair." See also *Collen v. Wright*, 7 E. & B. 301, 8 Id. 647; *Randell v. Trimen*, 18 C. B. 786; *Richardson v. Dunn*, 8 C. B. N. S. 655; and *Hughes v. Graeme*, 33 L. J. Q. B. 335.

*Barber v.
Lesiter.*

Again, in *Barber v. Lesiter*, 7 C. B. N. S. 175, a declaration alleged that the defendant and a third person unlawfully and maliciously conspired to procure possession of the plaintiff's premises, and illegally to keep and work private stills there, and by false representations as to the nature of the trade to be carried on induced the plaintiff to demise the premises to the third person, and that they carried on there their illegal trade, and by false and malicious representations and devices pretended that it was the plaintiff who had set up and kept the stills and carried on the illegal trade, by means of which an excise officer, who found the plaintiff on the premises, arrested him, and took him before a magistrate, who convicted him of keeping illicit stills. This declaration was demurred to, and the court held it to be bad in substance, as not showing any damage to the plaintiff resulting naturally and as a legal consequence from the acts of the defendant.

*Hoey v.
Felton.*

Again, in *Hoey v. Felton*, 11 C. B. N. S. 142, which was an action for false imprisonment, the plaintiff claimed special damage on the ground that he would have been engaged at a factory on the day on which he was imprisoned had he called there at a particular hour, but that owing to the misconduct of the defendant in giving him into custody, and keeping him in custody up to that hour, he had been

made so unwell that he was obliged to go home on his liberation, and when he called at the factory on the next day he found another journeyman had been engaged in his place. This damage was held to be too remote, and not to be the direct and immediate result of the defendant's wrongful act, as the loss to the plaintiff would not have occurred but for some facts over which the defendant had no control. See also *Duckworth v. Ewart*, 2 H. & C. 129, and *Lynch v. Knight*, *supra*, p. 512.

The judgments in *Ricket v. Metropolitan R. Co.*, L. R. 2 H. L. 175, should also be referred to on the subject. The actual decision in that case was that a lessee of a public-house, whose custom had been affected by the interference with the traffic, caused by the works of a railway company carried on under the powers of their Act in proximity to his house, was not entitled to compensation under the statutes relating to railway compensation: a decision based upon the language of those statutes. But some light is thrown by the discussion in that case on the wider question to which this note relates: and the authorities are there collected which show what damage is sufficient to support an action where the exercise of a right of way has been obstructed to the particular injury of an individual. *Ricket v. Metropolitan R. Co.* overruled the earlier cases of *Senior v. Metropolitan R. Co.*, 2 H. & C. 258, and *Cameron v. Charing Cross R. Co.*, 16 C. B. N. S. 430. *Brand v. Hammersmith R. Co.*, L. R. 4 H. L. 171, should also be referred to, where it was held (reversing the judgment of the Exch. Cham., L. R. 2 Q. B. 223, which had itself reversed that of the Q. B., 1 Id. 130) that the owner of a house, none of whose land had been taken by a railway company, could not claim compensation in respect of the injury to the house caused by the vibration, smoke, and noise, resulting from the traffic on the line. See also *Buccleuch v. Metr. Board of W.*, L. R. 5 H. L. 418; *Metr. Board of W. v. McCarthy*, 7 Id. 243; *Caledonian R. Co. v. Walker's Trustees*, 7 App. Cas. 259.

Principle illustrated by the decisions in compensation cases.

In *Cattle v. Stockton Waterworks Co.*, L. R. 10 Q. B. 453, a contractor had agreed with K. to construct a tunnel under a road of which K. was the owner; he was delayed in the course of the work owing to a leak in a main laid down along the road and belonging to the defendants, and was consequently damaged by the contract becoming a less profitable or a losing contract; it was held that such damage was too

Cattle v. Stockton Co.

remote to enable him to sue the defendants in respect of it.

*Victorian R.
Commissioners v.
Coultas.*

In *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222, the Judicial Committee held that damages for a nervous shock or mental injury caused by fright at an impending collision where no actual impact took place were too remote, and could not be recovered. This decision has, however, not been followed in Ireland; *Bell v. G. N. R. Co.*, 26 L. R. Ir. 428.

Instances of
actions of tort
where damage
held not too
remote.

*Knight v.
Gibbs.*

For instances in which the argument, that the damage assigned was too remote, has been held unavailable, may be cited *Knight v. Gibbs*, 1 A. & E. 43; *Green v. Button*, 2 C. M. & R. 707 (*ante*, p. 514); *Pilmore v. Hood*, 5 B. N. C. 97; and *Davies v. Solomon*, L. R. 7 Q. B. 112. In *Knight v. Gibbs* the declaration stated that the defendant spoke certain words of the plaintiff, in consequence of which she was obliged to leave the service of Enock, a finisher of straw hats, by whom she was employed. The evidence was, that the defendant came to Mrs. Enock, and said to her of the plaintiff and her fellow-lodger, "I am ashamed of their conduct: they were singing and making a noise, and tabouring the windows: it is no use their denying it: their conduct is shameful and disgraceful, more like a bawdy-house than anything: and no moral person would like to have such people in the house." Mrs. Enock, after this, dismissed the plaintiff and her companion; but said she did so, not because she believed what the defendant said, but because he was her landlord, and she was afraid of offending him. After a verdict for the plaintiff, a motion was unsuccessfully made to enter a nonsuit, on the ground that the damage did not flow from the imputation, but from Enock's wish to oblige the defendant, which would have produced the same effect had the words contained no imputation, but merely expressed his desire of the plaintiff's dismissal. "The case," said Patteson, J., "was not like *Vicars v. Wilcocks*, because here the whole cause of the special damage proceeds from the defendant himself: nothing is done by any other person." "It is clear," said Parke, J., "that if the words in question had not been used, the plaintiff would not have been dismissed; and it is sufficient for this action to show she was turned out in consequence of such words of the defendant. The effect of the evidence may be that the witness would have turned the plaintiff away if different words had been used; but different

words were not used, and she was sent away in consequence of these. In *Vicars v. Wilcocks*, supposing the point there to have been rightly decided, there were two distinct causes of the special damage : the words used, and an act done by a third person ; and the damage might have resulted from either."

Among later instances of actions in tort in which the argument that the damage assigned was too remote has been held unavailable, reference may be made to the following cases :—

Other later instances of damage not too remote.

In *Lee v. Riley*, 18 C. B. N. S. 722, through the defect of some fences which it was the defendant's duty to repair, a mare belonging to him strayed into a field of the plaintiff's, and there kicked and injured a horse of the plaintiff's, so as to cause his death. It was held that the defendant was responsible for his mare's trespass, and that the damage was not too remote.

Lee v. Riley.

This case was cited and followed in *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10, in which case was also cited from the sixth edition of this work the American decision in *Vandeburgh v. Truax*, 4 Denio, 464. In this last case a curious question came before the Supreme Court of the state of New York. The defendant, having had a quarrel in the street with a negro boy, took up a pick-axe and pursued him into the plaintiff's store, where the boy was employed. The negro being alarmed, and not able to escape rapidly by the back door, which was shut, ran behind the counter to save himself from being struck, and in so doing knocked out the faucet from a cask of wine standing there, a quantity of which ran out and was wasted. The question was whether the defendant was liable to the plaintiff for this loss. The court held that the defendant was liable ; the damage in question being, in their opinion, the direct and natural, though not the necessary, result of the wrongful act of the plaintiff : and they cited *Scott v. Shepherd* (*ante*, vol. i., p. 438), as being, in their opinion, an authority for this view. See also the cases collected in *Clark v. Chambers*, 3 Q. B. D. 327.

Ellis v. Loftus Iron Co.

In *Sneesby v. L. & Y. R. Co.*, L. R. 9 Q. B. 263, 1 Q. B. D. 42, the plaintiff's cattle, which were being driven across the defendants' railway on the level, were frightened by the negligence of the defendants' servants, so that they escaped from the control of the plaintiff's drovers, to whom no blame was attributable. Afterwards they were found run over and killed on another part of the defendants' railway, on which

Sneesby v. Lancashire & Yorkshire R. Co.

they appeared to have got through a defective fence. The court held that the damage was not too remote from the defendants' original injurious act of negligence in frightening the cattle, and that therefore the defendants were liable. See also *Hill v. New River Co.*, 9 B. & S. 303; and *Harris v. Mobbs*, 3 Ex. D. 268.

*Firth v.
Bowling Iron
Co.*

In *Firth v. Bowling Iron Co.*, 3 C. P. D. 254, the defendants were held liable for the loss of the plaintiff's cow, which had been killed through eating portions of the defendants' iron fence, which had decayed and fallen and become hidden amongst the grass on the plaintiff's land. See also, as to this kind of liability, *Lawrence v. Jenkins*, L. R. 8 Q. B. 274.

*Halestrap v.
Gregory.*

In *Halestrap v. Gregory*, (1895) 1 Q. B. 561, where a mare escaped from a field owing to the defendant's negligence in leaving a gate open, he was held liable in respect of injuries received by the mare whilst she was being driven back into the field, without negligence, by third parties.

Collisions
at sea.

In actions claiming damages in respect of collisions between ships caused by the negligence of the defendant's vessel, the loss of the ordinary and fair earnings of the plaintiff's vessel under a contract made before the time of the collision, but which, owing to the collision, she is unable to fulfil, may be recovered as damages; *The Argentino*, 14 App. Cas. 519. See further as to the damages recoverable in these cases, *The City of Lincoln*, 15 P. D. 15, where the grounding of a ship, which arose from the loss of her compass through the collision, was held a natural consequence of the collision.

Application of
the rule that
damage must
not be too
remote.

The rule that damage must not be too remote, but must be the natural and immediate result of the injury complained of, has been long established, but the application of that rule to the varying circumstances of different cases is sometimes attended with great difficulty; the subject is discussed at length in the very learned work of Mr. Theodore Sedgwick, "On the Measure of Damages," chap. 3. Mr. Sedgwick suggests a division of actions into three classes:—

Mr. Sedg-
wick's classi-
fication.

1. "Where the contract is for the payment of money alone."
2. "Where the contract is to do, or to refrain from doing, some particular thing."
3. "Where a tort is committed, or the action is brought for a violation of right unattended by any of those circumstances of aggravation which give the control of the matter to the jury" (such as fraud, malice, or oppression; for

where such matters of aggravation exist, a jury may give exemplary damages; *Emblen v. Myers*, 6 H. & N. 54; *Bell v. Mid. R. Co.*, 10 C. B. N. S. 287; *Reeves v. Penrose*, 26 L. R. Ir. 141; *Dreyfus v. Peruvian Guano Co.*, 42 Ch. D. 66, *per* Kay, J.; see S. C. in C. A., 43 Ch. D. 316, and in H. L., (1892) A. C. 166).

Exemplary
damages.

In the *first* class the measure of damages is the money agreed to be paid with interest. In the *second* the rule recommended is, "that the party in default shall be held liable for all losses that may fairly be considered as having been *in the contemplation of the parties* at the time the agreement was entered into." In the *third* class the difficulty of laying down any principle upon which the measure of damages is to be ascertained, beyond a strict adherence to the natural and proximate consequences of the act complained of, is confessed to be insurmountable.

The suggestion of Mr. Sedgwick as to his second class of cases seems to agree in substance with the decision of the Court of Exch. in *Hadley v. Baxendale*, 9 Exch. 341, where the question as to the proper measure of damages in such cases underwent discussion, and which is now the leading case on the subject. That was an action of assumpsit brought against the defendants as carriers for negligent delay in the delivery from Gloucester to Greenwich of a broken shaft of a mill to serve as a pattern for a new shaft, whereby the completion of the new shaft was delayed, and the plaintiffs' mill was consequently stopped, and the plaintiffs were deprived of the profits they would otherwise have made. The defendants paid 25*l.* into court, which the plaintiffs replied was not enough to satisfy the damage.

Hadley v.
Baxendale.

Upon the trial before Crompton, J., it appeared that the plaintiffs, having discovered the fracture, sent their servant to the office of the defendants, when he told the clerk that the mill was stopped and the shaft must be sent immediately; and, in answer to the inquiry when it would be taken, was informed that if sent any day before twelve o'clock it would be delivered the following day at Greenwich; the shaft was accordingly sent on the next day before noon, 2*l.* 4*s.* was paid for the carriage, and the clerk was told that a special entry, if required, should be made to hasten its delivery; the neglect arose in the non-delivery in sufficient time at Greenwich, whereby the making of the new shaft was delayed several days. Evidence was given of the loss of profits caused by the stoppage of the mill, which was objected to by

*Hadley v.
Baxendale.*

the defendants as being too remote ; the case was, however, left generally to the jury, who gave a verdict for 25*l.* beyond the sum paid into court.

The Court of Exch., in directing a new trial on the ground of misdirection, laid down the rule that should guide the judge on a future trial. "We think the proper rule," said Alderson, B., in delivering the judgment of the court, "in such a case as the present is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to *have been in the contemplation of both parties*, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made *were communicated* by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them." And the court granted a new trial upon the ground that "the judge ought to have told the jury that upon the facts then before them they ought not to take the loss of profits into consideration at all in estimating the damages."

Origin of the
rule in *Hadley*
v. Baxendale.

The rule enunciated by Pollock, C.B., in *Rigby v. Hewitt*, 5 Exch. 240, *viz.*, that "every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances from such misconduct," and the question suggested by the same judge in *Greenland v. Chaplain*, 5 Exch. 243, 248, *viz.*, "whether a person who is guilty of

negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated," (neither of which *dicta* was referred to in *Hadley v. Baxendale*), contain the germ of the decision in that case.

The rule laid down in *Hadley v. Baxendale*, or rather the second branch of it, is one which it would be in many cases difficult to apply in its precise terms, and it was not perhaps intended to lay down that the amount of damages should depend on the *mere* knowledge or ignorance of the defendant of the surrounding circumstances, apart from contract express or implied to be liable for the extraordinary amount of damages to which those circumstances might give rise; and reading the expressions in the judgment *secundum subjectam materiam*, they appear capable of this construction.

What notice of special circumstances is necessary to render the defendant liable.

Although this branch of the rule is only a *dictum*, because in *Hadley v. Baxendale* it was held that there was not sufficient notice, still it is now far too late to question it (*per* Lord Esher, *Hammond v. Bussey*, *post*, p. 528), as it has been constantly approved of in later cases (*e.g.*, in *Simpson v. L. & N. W. R. Co.*, 1 Q. B. D. 274), though in many of them with the modification above suggested. To use the words of Willes, J., in *British Columbia Co. v. Nettleship*, L. R. 3 C. P. 499, 509, "The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." And this view is strongly confirmed by the judgment in *Horne v. Mid. R. Co.*, L. R. 8 C. P. 131, notwithstanding the doubts expressed by learned judges in that case, and also in *Elbinger, &c. v. Armstrong*, L. R. 9 Q. B. 473, *post*, p. 534. It may therefore be said that where the knowledge of the special circumstances forms the basis of the contract, or where from the facts of the case it can be inferred that the parties intended that it should do so, it becomes an implied term of the contract that what may be called the indirect or more remote damages, if any, resulting from such special circumstances, shall be paid for. See *Ebbetts v. Conquest*, (1895) 2 Ch. 377, where the rule was applied in a case where an underlessee had notice of his lessor's liability to the superior landlord.

The question was very fully considered by the C. A. in *Hydraulic Engineering Co. v. McHaffie*, *Grébert-Borignis v. Nugent*, and *Hammond v. Bussey*:—

*Hydraulic
Engineering
Co. v.
McHaffie.*

*Per Bramwell,
L.J.*

In *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670, the defendants agreed to supply the plaintiffs with a special part of a machine, which, as the defendants knew, the plaintiffs were making for a contract under which they were obliged to deliver within a limited time. The defendants failed to supply the part, and they were held liable to the plaintiffs not only for the cost of making the rest of the machine, but also for the loss of the profits which the plaintiffs would have made. "The fact," said Bramwell, L.J., "that a binding agreement has been arrived at does not of itself create a responsibility for all the injury flowing from a breach of it; the wrongdoer is *primâ facie* only liable for the natural and ordinary consequences of the breach; but where at the time of entering into the contract both parties know and contemplate that if a breach of the contract is committed some injury will accrue, in addition to the natural and ordinary consequences of the breach, the person committing the breach will be liable to give compensation in damages upon the occurrence of that injury; and where the contractee states that he wants the article agreed to be made in order to help him to carry out another contract, the contractor, if he commits a breach in the delivery of the article, is liable for the loss sustained by the contractee if he becomes unable to carry out that other contract."

*Per Cotton,
L.J.*

Cotton, L.J., said: "We must follow out the rule that the plaintiffs are only to have the damages which are the ordinary and natural consequences of the breach; but this rule is subject to the limitation that where the breach has occasioned a special loss which was actually in contemplation of the parties at the time of entering into the contract, that special loss happening subsequently to the breach must be taken into account."

*Grébert-
Borgnis v.
Nugent.*

In *Grébert-Borgnis v. Nugent*, 15 Q. B. D. 85, the plaintiff sought to recover damages for breach of contract by the defendant to deliver to him skins of different specialities as to size and shape which the defendant knew at the time of making the contract that the plaintiff required for fulfilment of a contract by him to deliver skins to a customer on substantially the same terms except as regards price. The defendant failed to deliver, and, there being no market in which similar goods could have been bought by the plaintiff, the latter was held entitled to recover not only the profit which he lost, but also the damages which he was compelled to pay for non-fulfilment of his contract with his

customer. Brett, M.R., stated the result of the cases which carry out the principle laid down in *Hadley v. Baxendale* to be as follows: "Where a plaintiff under such circumstances as the present is seeking to recover for some liability which he has incurred under a contract made by him with a third person, he must show that the defendant, at the time he made his contract with the plaintiff, knew of that contract, and contracted on the terms of being liable if he forced the plaintiff to a breach of that contract. If such sub-contract was not made known to him at all, the defendant cannot be made liable for what the plaintiff has had to pay under it. If there be no market for the goods, then the sub-contract by the plaintiff, although not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to show what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value" (see *Stroud v. Austin*, C. & E. 119). "But where the sub-contract was fully made known to him in all its terms, in my opinion the defendant would be liable; and the proper inference, and one which the jury might infer, would be that he had contracted with the plaintiff upon the terms that if he broke his contract he should be liable for all the consequences of a failure by the plaintiff to perform his sub-contract. Still, however, it seems to me, according to what has been decided, that the original vendor, in such a case as this, is only liable, in the case of a breach of contract, for the natural consequences of so much of the sub-contract as was made known to him."

*Per Lord
Esher.*

In *Hammond v. Bussey*, 20 Q. B. D. 79, the question was whether the plaintiffs could recover from the defendant as damages the costs which they had incurred in unsuccessfully defending an action brought against them by a person to whom they had resold goods which the defendant had sold to them with a warranty, and which they had resold with a similar warranty. In this case the defendant, at the time that he contracted to supply the goods, which were coal of a particular description, knew that the plaintiffs required them for the purpose of reselling them by that description. The fact that the coal did not correspond with the description was not discovered until after the resale, and, on being informed that the sub-purchaser was suing the plaintiffs, the defendant repudiated all liability. It was held that the costs were recoverable as damages. Lord Esher, in giving judgment,

*Hammond v.
Bussey.*

*Per Lord
Esher.*

treated the fact that the defendant did not know with what particular person the plaintiffs would contract as immaterial, so long as he knew that the plaintiffs were buying to sell again. As to the damages, he said: "We find the rule of law as to the measure of damage enunciated in the case of *Hadley v. Baxendale*. It may be that the rule so laid down was not necessary for the purpose of deciding that case, but it is far too late to question it. The rule, though frequently commented upon, has been over and over again adopted by the courts, and must now be considered to be the law on the subject. . . . The rule is laid down thus: 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract'—(it is to be observed in passing that the rule is not contemplating a breach of contract to pay damages, but the damages which are recoverable in respect of a breach)—'should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself.' That is the enunciation of the rule with regard to damages for a breach of contract where no special circumstances arise, and would apply to this case if there had been no sub-contract which the defendant knew to exist or to be likely to be made. The rule goes on to state what the measure of damages is where there are special circumstances, as follows: 'or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.' It has been argued that these words are not an enlargement of the former part of the rule, but I cannot take that view of them. It is to be observed that the words are not 'such damages as were in fact in the contemplation of the parties at the time they made the contract,' which would have raised a question of fact for the jury, but 'such as may reasonably be supposed to have been in the contemplation of the parties,' not as the inevitable but as 'the probable result of the breach.' The next sentence of the judgment is, I think, to be considered rather as a valuable exemplification of the rule, an illustration of the circumstances under which the second branch of the rule would apply, than as part of the rule itself. It proceeds: 'Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages

resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated.' I do not think that there is anything in those words to show that the second branch of the rule must be confined to the case of a sub-contract already actually made at the time of the making of the contract, and would not apply to the case of a sub-contract not yet actually made, but which will probably be made. I think that this sentence must be looked upon as intended to be an exemplification of the second branch of the rule already stated rather than as part of it; and in any case it seems to me clear that the rule would apply to the case of a sub-contract which within the knowledge of the defendant was in the ordinary course of business sure to be made. . . . We must say, using our knowledge of business and affairs, what may reasonably be supposed to have been in the contemplation of the parties as the result of a breach of the contract, under the circumstances."

As to how far a general notice of special circumstances given by one party makes it incumbent on the other party to inquire into the details, and fixes him with liability in default of his doing so, see further the judgments in *Horne v. Mid. R. Co.*, *supra*, p. 525.

How far
general notice
sufficient.

In further illustration of the rule that damages must not be too remote, see (in addition to the numerous cases cited in *Hadley v. Baxendale*) the observations of Coke, C.J., in *Everard v. Hopkins*, 2 Bulst. 332, cited by Parke, B., in *Longmeid v. Holliday*, 6 Exch. 764; *Tarleton v. M'Gawley*, 1 Peake, 205; *Powell v. Salisbury*, 2 Y. & J. 391; *Peterson v. Ayre*, 13 C. B. 353; *Keene v. Dilke*, 4 Exch. 388; *Foxall v. Barnett*, 2 E. & B. 928; *Fletcher v. Tayleur*, 17 C. B. 21; *Theobald v. Railway Passengers' Ass. Co.*, 10 Exch. 45; *Dunlop v. Higgins*, 1 H. L. C. 381; Story, Equity Jur. 1316 a, and the cases cited *ante*, p. 511.

Authorities as
to remoteness
of damage.

In estimating the measure of damages for breach of contract, a distinction has been drawn between the cases in which the relations between the contracting parties were those of vendor and purchaser on the one hand, and cases of contracts with carriers, &c., on the other. See the judgment of Martin, B., in *Horne v. Mid. R. Co.*, *supra*. It may be convenient, in referring to the cases in which the rule in *Hadley v. Baxendale* has been considered, to divide them

Rule, as
applied to (1)
contracts of
sale, (2) bail-
ments.

Cases of
vendor and
purchaser.

into these two classes ; and first, as to the cases of vendor and purchaser :—

The rules applicable in ordinary cases of contracts for the sale of goods are now embodied in the Sale of Goods Act, 1893, ss. 50, 51, 53 (2), 53 (3), but the Act does not affect the right to recover special damages in any case where by law special damages may be recoverable (s. 54).

Sub-contracts.
Randall v.
Raper.

In *Randall v. Raper*, E. B. & E. 84, the defendant had sold to the plaintiff barley seed, warranting it to be of a particular quality ; this warranty had been broken ; the plaintiff had, in reliance on it, resold the barley to a third person with a similar warranty, and this person had claimed from the plaintiff compensation, which he had agreed to make, but had not actually paid. The Q. B. was of opinion that the jury ought, in assessing the damages, to include the amount for which the plaintiff had become liable to his sub-vendee. Wightman, J., expressed a doubt in this case, but only as to whether it was not necessary that the sub-vendee's claim should have been actually ascertained and paid ; see also *Josling v. Irvine*, 6 H. & N. 512 ; *Wagstaff v. Shorthorn Dairy Co.*, C. & E. 324.

Dingle v.
Hare.

In *Dingle v. Hare*, 7 C. B. N. S. 145, the Court of C. P. expressed an opinion, although it was not necessary to decide the case on that ground, that a vendee relying upon his vendor's guarantee, and reselling goods with a like representation, would be entitled to claim from his vendor, as a damage naturally resulting from the breach of warranty, the compensation claimed from the vendee by his sub-vendees. See also *Hammond v. Bussey*, ante, p. 527.

Where no
market.
Borries v.
Hutchinson.

In *Borries v. Hutchinson*, 18 C. B. N. S. 445, the defendant had contracted to sell to the plaintiff caustic soda, to be shipped in June, July, and August, knowing that the soda was bought for sale and for shipment at Hull. Part of the soda was not shipped or delivered according to contract. The plaintiff had resold, and his purchaser had again resold. There was no market in which the soda could be replaced. The defendant paid into court the loss of profit on the first sub-sale, and was held not liable for the loss on the subsequent sub-sales. See this case explained by Brett, M.R., in *Grébert Borgnis v. Nugent*, 15 Q. B. D. 90. It was followed in *Hinde v. Liddell*, L. R. 10 Q. B. 265, where, there being no market in which the plaintiff could procure shirtings of the description which the defendant had contracted, but failed, to supply, the plaintiff was held entitled to buy

Hinde v.
Liddell.

shirtings as near in quality as possible, though slightly superior, with which to supply his sub-vendee, and to charge the defendant with the difference in cost.

Damages as
between
vendor and
purchaser.

On the other hand, in *Williams v. Reynolds*, 6 B. & S. 495, a case very similar to that of *Borries v. Hutchinson*, except that there appears there to have been a market in which to replace the goods, the vendor was held not liable for the profit even on the first sub-sale, but only for the difference between the contract price and the market price at the date for delivery. And it was said that in *Borries v. Hutchinson* the court must be taken to have considered the sub-contract as contemporaneous, and known to the vendor at the time of his contract. It was admitted, however, in *Williams v. Reynolds*, that it was the universal custom in contracts, like that under consideration, for "forward delivery" for the purchaser to resell as had been done.

Williams v
Reynolds.

In *Thol v. Henderson*, 8 Q. B. D. 457, which was an action for breach of contract to deliver goods, it was shown that the goods were not procurable in the market, that the plaintiff had entered into a contract of sub-sale, which in consequence of the non-delivery he could not perform, that such contract was not known to the defendant at the time of sale, but that he knew that the goods had been purchased by the plaintiff for resale. It was held by Grove, J., that the plaintiff was not entitled to recover damages for loss of profit on the resale, but only to the difference in the market value of the goods.

Thol v.
Henderson.

As to loss of profits, see also *Smeed v. Foord*, 1 E. & E. 602, where the defendant contracted to furnish the plaintiff, a farmer, with a threshing machine before the expiration of a certain time. On the day on which the machine should have been delivered, the plaintiff's wheat was ready for threshing in the field; and it was his practice, as, from previous dealings, was well known to the defendant, to thresh his wheat in the field and send it off thence straight to market, instead of carrying it home and stacking it there first. The plaintiff remonstrated several times as to the delay, and was assured by the defendant that the machine would be sent at once. He then tried to hire another machine, but, not being able to do so, was forced to carry home his wheat and stack it there. He was, however, unable to obtain straw or labour to thatch it, and the stacks were afterwards damaged by rain. The defendant then delivered the machine to the plaintiff, who received it,

Loss of profits.
Smeed v.
Foord.

Damages as
between
vendor and
purchaser.

*Jaques v.
Millar.*

*Cory v.
Thames Iron-
works Co.*

No liability
for collateral
contract
uncom-
municated.

*Portman v.
Middleton.*

and paid for it, and proceeded to thresh the wheat. But, owing to the injury it had received, it was necessary to kiln-dry it, and it sold, when sent to market, where the price of wheat had fallen, for less than it would have fetched had it been threshed at the time when the machine ought to have been delivered, and then sold. It was held, under these circumstances, in an action brought by the farmer for the non-delivery of the machine, that he was entitled to substantial damages in respect of the expense of stacking his wheat, in respect of its deterioration by the rain, and in respect of the cost he had incurred in getting it kiln-dried; but that he could claim no damages by reason of the fall in its market price. And as to the latter point, see *Collard v. S. E. R. Co.*, 7 H. & N. 79. In *Jaques v. Millar*, 6 Ch. D. 153, Fry, J., held loss of profits of a business recoverable in an action for breach of an agreement to grant a lease, the defendant having known at the time of the agreement that the lessee intended to carry on the business on the premises.

In *Cory v. Thames Ironworks Co.*, L. R. 3 Q. B. 181, where the plaintiff had contracted with the defendant for the construction by the latter of a steam derrick, which the plaintiff intended to use for a special purpose, more profitable than the ordinary and obvious purpose for which the defendant supposed it was to be used, and there was delay in delivery: the defendant was held liable for the profits which would have been made by the ordinary, but not by the extraordinary, use of the derrick during the period of delay. See also *Fletcher v. Tayleur*, 17 C. B. 21; and *Ex p. Cambrian Steam Packet Co.*, 4 Ch. 117, per Lord Cairns.

In the above cases the liability to the claims of the sub-vendees seems to have depended on the question whether the loss was the direct and natural result of the original breaches of warranty rather than upon any application of the second branch of the rule in *Hadley v. Baxendale*. But it is clear on general principles, and from *Hadley v. Baxendale*, that no liability is incurred in the ordinary case of a separate and distinct collateral contract with a third person, uncommunicated to the original contractor or wrong-doer, although the non-performance of this contract may, in one sense, have resulted from the original wrongful act or breach of contract.

Thus in *Portman v. Middleton*, 4 C. B. N. S. 322, the plaintiff had employed the defendants to make for him a fire-box within a particular time, paying them for it at the

time of the contract. This fire-box was needed for a steam-engine which the plaintiff had undertaken to repair by harvest-time for a third person; but no notice of this fact was given by the plaintiff to the defendants at the time of the contract between them. The defendants did not make the fire-box until after the appointed time, and when it was sent to the plaintiff it was found to be useless. The plaintiff then employed a third person to make another fire-box, for which he was obliged to pay a larger sum than the price which he had originally paid to the defendants. The repairs of the steam-engine not having been finished by the plaintiff for harvest-time, the owner of the engine sued him for the breach of contract, and afterwards agreed to settle the matter on being paid a sum of money as compensation. Under these circumstances, the court held that the plaintiff was entitled to recover from the defendants the price originally paid to them for the fire-box, and also the extra expense to which he had been put in obtaining a fire-box elsewhere; but that the compensation paid by the plaintiff to the owner of the steam-engine was not recoverable. "The special damage," said Crowder, J., in delivering the judgment of the court, "was sought to be recovered by reason of the plaintiff having entered into a contract with one Sheaf (the owner of the steam-engine) to repair for him a steam threshing machine. The contract between the plaintiff and the defendants as to the fire-box was quite separate and distinct from that. The defendants had nothing whatever to do with the contract between Sheaf and the plaintiff. But it was said that, inasmuch as Sheaf had brought an action against the plaintiff for his breach of contract—a breach of contract occasioned by the insufficiency of the article furnished by the defendants—and had recovered damages for the breach of that contract, that was a damage which the plaintiff was entitled to recover against the defendants for the breach of their contract. We think, however, that this case is entirely governed by *Hadley v. Baxendale*, and does not come within that rule by which alone the sum could be recovered as special damage."

Damages as
between
vendor and
purchaser.

It must also be observed that in this case, although the judgment of the court was not rested upon that circumstance, there was evidence to show that there was sufficient time for the plaintiff to have performed his contract with the owner of the steam-engine, after the defendants had broken their contract.

Damages as
between
vendor and
purchaser.

*Elbinger v.
Armstrong.*

See also *Elbinger, &c. v. Armstrong*, L. R. 9 Q. B. 473, where, the defendant having contracted to manufacture wheels and axles, it was doubted whether he could be held liable for penalties *as such* incurred by the plaintiffs through the non-fulfilment of a contract with the Russian Government, which they had been prevented from fulfilling by the defendant's failure to deliver the wheels and axles: but the court said, "If the judge had told the jury expressly that the penalties as such could not be recovered, but that the plaintiffs were entitled to such damages as in their opinion would be fair compensation for the loss which would naturally arise from the delay, including therein the probable liability of the plaintiffs to damages by reason of the breach through the defendant's default of that contract to which, as both parties knew, the defendant's contract with the plaintiffs was subsidiary, the direction would not, at all events, have been too unfavourable to the defendant." This ruling was approved in the C. A. in *Grébert Borgnis v. Nugent*, 15 Q. B. D. 85.

*Wilson v.
Gen. Iron
Screw Coll.
Co.*

In *Wilson v. General Iron Screw Collier Co.*, 47 L. J. Q. B. 239, Cockburn, C.J., held the defendants liable for the loss of earnings caused by the detention of a ship for the replacement of machinery which had been defectively constructed for her by the defendants.

*Mowbray v.
Merryweather.*

In *Mowbray v. Merryweather*, (1895) 1 Q. B. 857, 2 Id. 640, the defendant, who contracted to supply to the plaintiff a chain reasonably fit to be used in unloading a ship, but supplied a defective chain, was held liable to the plaintiff for the damages which the plaintiff had to pay to his workman who was injured by the breaking of the chain. Cp. *Kiddle v. Lovett*, 16 Q. B. D. 605.

Effect of
wilful false
statement
by vendor.

It should be observed that where there has been a wilful misrepresentation by a vendor a different measure of damages may be applied. Thus in *Mullett v. Mason*, L. R. 1 C. P. 559, the defendant had sold to the plaintiff a cow which was suffering from the cattle plague. The seller knew that she had an infectious disease at the time when he sold her, but he assured the buyer that she had not, and warranted her sound. The buyer placed the cow in a cow-house with five other cows, all of which afterwards caught the cattle plague and died. The court held that as the seller had wilfully made a false statement, he was liable for all the consequences that might reasonably be expected to follow from the buyer acting upon the faith of that statement, and that consequently the value

of these other cows was recoverable. The principle of the distinction seems to be that the fraud gives the misrepresentation the character of a *tort*, for the natural consequences of which the defendant is liable irrespective of notice.

Damages as
between
vendor and
purchaser.

By a somewhat similar analogy, in *France v. Gaudet*, L. R. 6 Q. B. 199, which was an action of trover for the conversion of wine which the plaintiff had sold at a profit, and for which there was no market, it was held that the sale gave the article a *special value*, for which the plaintiff in an action of this sort was entitled to recover irrespective of notice. See this distinction dwelt upon in *The Star of India*, 1 P. D. 466, by Sir R. Phillimore, who held the loss of a charterparty recoverable as part of the damages caused by a collision at sea; but, in *The Notting Hill*, 9 P. D. 114, it was laid down by Brett, M.R., that "upon the question of remoteness of damage there is no difference between actions upon contract, and those not upon contract."

France v.
Gaudet.

In *Smith v. Green*, 1 C. P. D. 92, the C. P. D. were careful to abstain from giving an opinion upon the above distinction. There the defendant had sold to the plaintiff a cow warranted sound, which the jury found to have been suffering from foot-and-mouth disease, though they negatived any fraud on the part of the vendor. The disease was communicated to other cows of the plaintiff. Archibald, J., at *nisi prius*, told the jury that, in estimating the damages for the defendant's breach of warranty, they might take into consideration the fact that the buyer was a farmer, and that the seller knew, or must be taken to have known, that the cow in question would be placed with other cows, and that the consequences which had resulted might naturally be expected to happen. The jury found for the plaintiff, with 50*l.* damages, the value of the particular cow being only 8*l.* The above ruling was upheld by the court. Cp. *Ward v. Hobbs*, 4 App. Cas. 13 (*ante*, p. 91).

Smith v.
Green.

In *Knowles v. Nunns*, 14 L. T. 592, the plaintiff, when buying two oxen of the defendant, told him that if there was the least fear of disease he would not have them, as he wanted to put them with his other stock, upon which the defendant said they were quite sound and free from disease. It turned out that they had the rinderpest, which they communicated to other cattle of the plaintiff, for the loss of which defendant was held liable. But in that case distinct notice was given that they were to be placed with the plaintiff's other cattle.

Knowles v.
Nunns.

Damages as
between
vendor and
purchaser.

Rule of
French jurists
on point in
Mullett v.
Mason.
Pothier.

The decision in *Mullett v. Mason*, *supra*, is in complete accordance with the rules laid down by the French jurists in similar cases. Pothier, in his *Traité des Obligations*, discusses this very case; see part i., chap. 2, art. 3; and the general principles which he laid down as applicable to cases of this description, and the limitations on those principles, are worth citing, as showing the mode in which foreign jurists deal with these questions. "Si un marchand," he says (s. 166), "m'a vendu une vache qu'il savait être infectée d'une maladie contagieuse, et qu'il m'ait dissimulé ce vice, cette dissimulation est un dol de sa part, qui le rend responsable du dommage que j'ai souffert, nonseulement dans la vache même qu'il m'a vendu, et qui a fait l'objet de son obligation primitive, mais pareillement de ce que j'ai souffert dans tous mes autres bestiaux auxquels cette vache a communiqué la contagion: car c'est le dol de ce marchand qui m'a causé tout ce dommage." He then asks, what, if in consequence of the death of his cattle by the infection the farmer is unable to cultivate his lands?—what, if in consequence of the non-cultivation of his farm the farmer becomes unable to pay his debts, and his creditors seize and sell his goods below their value? Is the seller liable for these damages? To this question Pothier answers (s. 167), that the true principle to be applied is that "on ne doit pas comprendre dans les dommages et intérêts dont un débiteur est tenu pour raison de son dol, ceux, qui nonseulement n'en sont qu'une suite éloignée, mais qui n'en sont pas une suite nécessaire, et qui peuvent avoir d'autres causes." Applying this principle, he holds that the indirect damages in question (except perhaps some loss in the profits of the farm, which would have been incurred even if the farmer had hired other cattle) are not recoverable from the seller.

Dumoulin.

And this decision is, he says, in conformity with the rule laid down by Dumoulin, who, speaking of the damages recoverable from a tenant who had maliciously set fire to the house, says, "Et adhuc in doloso intelligitur venire omne detrimentum tunc et proxime secutum, non autem damnum postea succedens ex novo casu, etiam occasione dictæ combustionis, sine quâ non contigisset; quia istud est damnum remotum, quod non est in consideratione." M. Bédarride, in his well-known *Traité du Dol et de la Fraude*, also adopts these conclusions; see vol. i., ss. 309, 310. After mentioning the case of a sale of infected cattle by a person not aware of the existence of the disease, in which case he says

Bédarride.

that the damages should be merely the price of the cow, and the cost of replacing her, even though the infection may have spread, this being the damage *propter rem ipsam non habitam*, he proceeds, "Au contraire, la maladie de la vache était connue du marchand, qui en a dissimulé l'existence. Cette dissimulation est un véritable dol qui l'oblige à réparer le préjudice qui en a été *la suite immédiate et directe*. Evidemment la contagion, qui a fait périr les autres bestiaux, n'a pas eu d'autre cause déterminante que le dol. Le coupable doit donc indemniser l'acquéreur non-seulement du prix de la vache et de la dépense nécessitée par son remplacement, *mais encore de la valeur de tout le bétail mort des suites de la contagion* et les frais exposés pour le remplacer. Mais la perte de ses bestiaux peut avoir pour l'acquéreur des conséquences plus fâcheuses encore. Ainsi, il peut soutenir qu'il a été placé par là dans l'impossibilité de cultiver ses terres et privé ainsi de toute récolte; que cette privation l'a mis dans le cas de ne pouvoir satisfaire à ses engagements, et qu'il s'est vu contraint de laisser exproprier ses biens. Pourrait-il obtenir contre le marchand la réparation de tout ce préjudice? Il est certain que, dans le fond, la prétention tendant à faire décider l'affirmative n'est pas sans motifs plausibles. On comprend, en effet, que la mort des bestiaux d'une ferme, arrivée pendant une certaine saison, peut exercer une influence fâcheuse sur la position du propriétaire, et entraîner même la saisie de ses biens. Mais, on répondra, avec raison, que le défaut de culture et le non-paiement des créanciers n'ont qu'une relation indirecte et éloignée avec le fait imputable au marchand, ils n'en étaient même pas les suites nécessaires. Il est positif, en effet, que le propriétaire pouvait cultiver en achetant ou en louant d'autres bestiaux, et qu'ayant eu le tort de ne pas le faire, il a commis personnellement une faute dont il est responsable. En un mot, on peut dire de ces dommages ce que Dumoulin disait pour l'incendiaire, ils peuvent bien être attribués à la mort des bestiaux, sans laquelle ils ne se seraient pas réalisés, mais il sont réellement nés *ex novo casu*, et conséquemment on ne peut qu'adopter la conclusion de ce jurisconsulte : *istud est damnum remotum, quod non est in consideratione*."

Damages as between vendor and purchaser.

Where the defendant sold to the plaintiff adulterated butter with a warranty that it was genuine, and the plaintiff, having resold it to his customers, was fined under the Margarine Act, it was held that the plaintiff could not, in an

Loss of trade, and penalty, in action on warranty.

Damages
against
carriers and
other bailees.

Case of
carriers, &c.
Sanders v.
Stuart.

Loss of profit,
how recover-
able.

Gee v. Lan-
cashire &
Yorkshire
R. Co.

British
Columbia Co.
v. Nettleship.

Horne v. Mid-
land Rail. Co.

action for the breach of warranty, recover either the general loss of trade he had sustained, or the amount of the penalty ; *Fitzgerald v. Leonard*, 32 L. R. Ir. 675.

To come to the second class of cases, the second branch of the rule in *Hadley v. Baxendale* as to liability by notice has been constantly approved, and was acted upon in *Sanders v. Stuart*, 1 C. P. D. 326. In that case the defendant, whose business it was to collect telegraphic messages for transmission, was intrusted by the plaintiff with a message *in cipher*, which he negligently omitted to send. The court, without expressing any opinion as to what would have been his liability if the message had been intelligible to him, held that under the circumstances the above principle applied, and that he was liable for nominal damages only.

Where carriers had for some days neglected to deliver cotton sent by their railway without any special notice of the importance of a speedy delivery, and in consequence of this delay, and of the mill-owner having no other cotton at hand, the mill had been stopped, the Court of Exch. was of opinion that a jury was improperly directed that the wages paid and profits lost on the days of stoppage were recoverable from the carriers as *legal damages*, since this direction assumed that the stoppage arose entirely from the non-delivery of the cotton, when in fact it arose partly from that and partly from the mill-owner's having no cotton to go on with. It would seem, from the judgment of the court in this case, that the damages in question might properly have been given by the jury, if they had found as a fact that the stoppage of the mill was a consequence which, either from express notice or from the usual course of business in the district, might have been reasonably anticipated by the parties at the time of the making of the contract ; *Gee v. L. & Y. R. Co.*, 6 H. & N. 211.

In *British Columbia Co. v. Nettleship*, L. R. 3 C. P. 499, the rule in *Hadley v. Baxendale* was much considered, and the defendant, a shipowner, was held not liable for loss of profits through the stoppage of the plaintiff's mill whilst parts of the machinery were being replaced, which had been entrusted to the defendant for carriage and had been lost. The measure of damages was held to be the cost of replacing the lost articles at the port of delivery with interest. The defendant in this case had notice that the case delivered to him contained machinery for a mill.

In *Horne v. Mid. R. Co.*, L. R. 8 C. P. 131, the majority

of the Exch. Cham. held (*diss.* Pigott, B., and Lush, J.) that a notice given to the defendants of a profitable contract made by the plaintiff in respect of goods entrusted to them by him for carriage was insufficient to fix the defendants with liability for the loss of such profits occasioned by reason of the defendants' delay in delivering the plaintiff's goods, which enabled the plaintiff's purchaser to refuse the goods.

In *Wilson v. L. & Y. R. Co.*, 9 C. B. N. S. 632, the rule laid down in *Hadley v. Baxendale* was considered. In this case the action was brought by a cap manufacturer against carriers for the damages sustained by delay in the delivery of cloth. The plaintiff had by reason of the delay lost the season for making the cloth into caps, and so for disposing of it. It was held, upon these facts, that although the jury could not (according to the rule in *Hadley v. Baxendale*) award to the plaintiff damages for the loss of the profits which he might have made by turning the cloth into caps, they were justified in giving him damages in respect of the loss of the season; in respect, that is, of the diminution, through this event, of the marketable value of the cloth. This case was followed in *Schulze v. G. E. R. Co.*, 19 Q. B. D. 30, where, in an action for delay in delivering a parcel known to contain samples, and which could not be procured elsewhere, it was held that damages for the loss of the season could be recovered.

When loss of profit on the article itself recoverable against carriers, &c.

Loss of Season.

In *O'Hanlan v. G. W. R. Co.*, 6 B. & S. 484, which was an action against the company for not delivering drapery goods, it was held that the measure of damages was the price at which the goods could be obtained in the market, if there was one, at the place and time at which they ought to have been delivered, and that, if not, the damages must be ascertained by adding to the cost price and expense of transit the reasonable profit of the importer. See also *Simpson v. L. & N. W. R. Co.*, 1 Q. B. D. 274.

O'Hanlan v. G. W. R. Co.

In *Lilley v. Doubleday*, 7 Q. B. D. 510, the defendant contracted to warehouse certain goods for the plaintiff at a particular place, but he warehoused a part of them at another place, where, without any negligence on his part, they were destroyed. It was held that the damage was not too remote, and that the defendant, by his breach of contract, had rendered himself liable for the loss of the goods.

Lilley v. Doubleday.

The subject was much discussed in *Hobbs v. L. & S. W. R. Co.*, L. R. 10 Q. B. 111, where the defendants, having carried the plaintiffs to a wrong destination, were held liable

Hobbs v. L. & S. W. R. Co.

for the amount of damages assessed by a jury, for the inconvenience caused to the plaintiffs by having to walk home at night, but not for the medical and other expenses, caused by a cold, which the female plaintiff caught through her exposure thereby to the weather. But this case was commented upon with some disapproval in *McMahon v. Field*, 7 Q. B. D. 591. See also *Le Blanche v. L. & N. W. R. Co.*, 1 C. P. D. 286.

The Parana.

There is a distinction, however, in the case of carriage by sea. This was decided in *The Parana*, 2 P. D. 118. There the C. A., reversing the judgment of Sir R. Phillimore, held that where there had been delay in delivery of the plaintiff's goods carried by the ship in question, from Manilla and Ilo-Ilo to London, the shipowner was not liable for a fall in market which took place during the interval between the times when they ought to have been and when they were delivered. The court drew a distinction between the case of a long sea voyage and cases where railway companies had been held liable for similar damages in respect of short journeys by land. This case was followed in *The Notting Hill*, 9 P. D. 105, which was approved of in *Victorian Rail. Commrs. v. Coultas*, 13 App. Cas. 222. See *Bell v. G. N. R. Co.*, 26 L. R. Ir. 428.

Overcrowded train.

An assault upon a passenger, or the theft of his purse, is not a natural consequence of a breach of duty by a railway company in allowing their trains to be overcrowded, and such damage is too remote; *Pounder v. N. E. R. Co.*, (1892) 1 Q. B. 385; *Cobb v. G. W. R. Co.*, (1893) 1 Q. B. 459.

Dishonour of bills.

As to the liability of a banker who has undertaken to pay bills and fails to do so, though provided with funds for the purpose, see *Prehn v. Bank of Liverpool*, L. R. 5 Ex. 92.

Re-exchange.

As to re-exchange, see *Re General South American Co.*, 7 Ch. D. 637; *Willans v. Ayers*, 3 App. Cas. 133; *Re Gillespie*, 18 Q. B. D. 286; *Ex p. Commercial Bank of S. Australia*, 36 Ch. D. 522.

Non-registration of shares.

As to the measure of damage on a wrongful refusal by a company to register the plaintiff as the owner of shares, see *Balkis Consolidated Co. v. Tomkinson*, (1893) A. C. 396.

Costs of litigation.

As to the recovery of costs of unsuccessfully defending an action by a third party, see *Baxendale v. L. C. & D. R. Co.*, L. R. 10 Ex. 35, where it was decided that if the costs are unreasonably incurred they cannot be recovered; *Fisher v. Val de Travers Co.*, 1 C. P. D. 511; *Hornby v. Cardwell*, 8 Q. B. D. 329; *Hammond v. Bussey*, cited ante, p. 527,

where the circumstances were, it will be observed, special, as the defendant was consulted before the action against the plaintiff was defended, and nevertheless denied that there was any liability, and may be said to have driven the plaintiff to defend the action; see *per* Bowen, L.J., 20 Q. B. D. at p. 96; see further, *ante*, vol. i., pp. 149, 150, and vol. ii., p. 383.

See also, on the subject generally, Mayne on Damages; *Collard v. S. E. R. Co.*, 7 H. & N. 79; *Rice v. Baxendale*, Id. 96; *G. W. R. Co. v. Redmayne*, L. R. 1 C. P. 329; and the judgments in *Wilson v. Newport Dock Co.*, L. R. 1 Exch. 177; *Hobbs v. L. & S. W. R. Co.*, L. R. 10 Q. B. 111; and *Bradshaw v. L. & Y. R. Co.*, L. R. 10 C. P. 189.

As to whether consideration on the part of a plaintiff for a contract may be given in evidence as an element for the jury in determining what is the amount of damages for breach of it, see *Brady v. Oastler*, 3 H. & C. 112, where the court differed on the point, but the majority, *diss.* Martin, B., held that the evidence was in that case inadmissible.

Whether
consideration
for contract
an element in
the damages.

NEPEAN v. DOE.

TRINITY.—7 W. 4, IN CAM. SCAC.

[REPORTED 2 M. & W. 894.]

Adverse possession since Stat. 3 & 4 W. 4, c. 27.

When a party has been absent for seven years without having been heard of, the presumption of law then arises that he is dead ; but there is no legal presumption as to the time of his death.

By the statute 3 & 4 Will. 4, c. 27, ss. 2, 3, the doctrine of non-adverse possession is abolished.

THIS was an ejectment, commenced in Hilary Term, 1834, to recover possession of copyhold premises in the parish of Loders, in the county of Dorset (being the same premises claimed in the cause of *Doe d. Knight v. Nepean* (a), and was tried before Patteson, J., at the Dorsetshire Spring Assizes, 1835, when the following evidence was given on the part of the plaintiff:—

2nd January, 1788.—At a court held this day for the manor of Loders, Matthew Knight took of the lord certain copyhold tenements called the Roofless Living and Home Living (being part of the premises in question in this cause), to hold to him the said Matthew Knight and Edward Knight (his brother), and Elizabeth Mary Davies, for their lives, and for the life of the longest liver of them, successively.

16th October, 1794.—At a court held this day, the said Matthew Knight took of the lord a certain copyhold tenement called Mabys Hay, (being other part of the premises in question,) to hold to him the said Matthew Knight and Rice Davies Knight his son, for their lives, and the life of the longest liver of them, successively, in reversion immediately after the determination of the estate of Henry Budden therein.

20th March, 1797.—At a court held this day, George Bagster and Nathaniel Taylor, as assignees of the said Matthew Knight, a bankrupt, were admitted tenants to the said tenements called

(a) 5 B. & Ad. 86 ; S. C., *sub nomine Doe d. Slade v. Nepean*, 2 N. & M. 219.

Roofless Living, Home Living, and Mabys Hay, except out of the latter as to one close called Sheep Acres, to which they were admitted tenants in reversion of the said Henry Budden.

At the same court George Knight took of the lord the reversion of the said tenements called Roofless Living and Home Living, to hold to Paul Slade Knight (the lessor of the plaintiff) and Thomas Clothier Knight, sons of the said George Knight, for their lives, and the life of the longest liver of them, successively, after the determination of the estate and interest which the said George Knight claimed to have for the life of the said Matthew Knight his brother.

And, at the same court, there was entered a letter of attorney, dated 13th March, 1797, whereby the said George Bagster and Nathaniel Taylor appointed Richard Travers their attorney, to take admittance of the said tenements called Roofless Living, Home Living, and Mabys Hay, together with the said close called Sheep Acres, and to surrender the same to the use of the said George Knight, his executors, administrators, and assigns, for the life of the said Matthew Knight.

In August, 1806, Thomas Clothier Knight died. In December in the same year, or early in 1807, Matthew Knight went to America; and in May, 1807, a letter was received from him, but he was never heard of afterwards.

Matthew Knight was in possession of the premises in question for the three years preceding his bankruptcy, which happened in 1797; and after that event George Knight entered into possession of the same premises as the purchaser of Matthew Knight's interest, and continued in such possession till his death; but he was never actually admitted tenant to the lord.

On 1st August, 1807, George Knight executed an indenture of mortgage to the said Richard Travers of all the said premises, for the term of seventy years, if the said Matthew Knight should so long live, for securing the payment of two several sums of 838*l.* and 375*l.* Soon after the date of this mortgage, all the premises were sold to Sir Evan Nepean, the father of the defendant in this action (the plaintiff in error), but the purchaser was never admitted tenant to the lord; and, if any formal conveyance was executed, it had been lost.

On the 12th December, 1807, George Knight died.

On the 6th April, 1808, Sir Evan Nepean granted a lease of the premises to the said Richard Travers for the term of fourteen years from this date, and Travers under-let the premises to George Way, who occupied them from the death of the said George Knight in 1807, to the death of Travers in 1813. Shortly after Travers's death the premises were surrendered by his executors to Sir Evan Nepean, who continued in possession thereof by himself or his tenants from thence until his death in 1822; and from that time to the present the defendant, Sir Molyneux Nepean, has been in the possession thereof.

Upon these facts, two questions were raised at the trial; first, whether it was incumbent on the lessor of the plaintiff to prove that the said Matthew Knight was actually alive within twenty years next before the commencement of the action; secondly, whether it appeared upon the evidence that there had been an adverse possession of the premises against the lessor of the plaintiff, for twenty years before the action brought. The learned judge stated his opinion to the jury as to the first point, that it was incumbent on the lessor of the plaintiff to prove that Matthew Knight was actually alive within twenty years, and that he had not proved it: and as to the second point, that if Sir Evan Nepean took as purchaser of the interest of George Knight, then his possession had not been adverse for twenty years, because it could not be adverse so long as it was uncertain whether Matthew Knight was alive or dead, which it was up to May, 1814. The jury found that Matthew Knight was not proved to have been actually alive within twenty years next before the commencement of the action, but that it did not appear by the evidence that there had been an adverse possession of twenty years as against the lessor of the plaintiff, and the verdict was thereupon entered for the plaintiff.

The lessor of the plaintiff excepted to the opinion of the learned judge on the first point, and the defendant to his opinion on the second point, and cross bills of exception were tendered and sealed accordingly, and writs of error sued out thereon. The case was argued in last Michaelmas vacation by

Sir *W. W. Follett*, for the plaintiff in error.—The lessor of the plaintiff, in order to sustain the action, was bound to prove both his right of property in the premises, and his right of entry. To

make out these it became incumbent on him to show—first, that Matthew Knight was dead; and, secondly, that the title fell on him in remainder within twenty years before the commencement of the action; therefore he was bound to prove the death of Matthew Knight within twenty years before action brought. It was contended for the lessor of the plaintiff, that, by analogy to the statute against bigamy, 1 Jac. 1, c. 11, s. 2, and the statute 19 Car. 2, c. 6, as to estates *pur autre vie*, the presumption of the death of Matthew Knight did not arise until the expiration of seven years after he was last heard of: in other words, that he must be presumed to have lived to the end of those seven years. This is in effect, as to this point, a writ of error from the judgment of the Court of King's Bench (b), which decided that there was no legal presumption at all as to the *time* of his death. It is not necessary, therefore, to refer again to the authorities cited on that occasion; but a case has been since decided, in which the same doctrine was re-stated. In *Rex v. Inhabitants of Harborne* (c), on an appeal against an order of removal of a female pauper, the respondents having proved her settlement by marriage, the appellants showed that the husband had been previously married, and that a letter had been written by his first wife, bearing date twenty-five days before the second marriage, from Van Diemen's Land. The sessions having on this evidence quashed the order of removal, the Court of King's Bench held that they were warranted in so doing, for they might presume that the first wife was living at the time of the second marriage. *Rex v. Twynning* (d) had been cited as an authority to the contrary. Lord Denman, C.J., says (e): "I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances; such, for instance, as the age or health of the party. There can be no such strict presumption of law. In *Doe d. Knight v. Nepean*, the question arose much as in *Rex v. Twynning*. The claimant was not barred, if the party was presumed not dead till the expiration of the seven years from the last intelligence. The learned judge who tried the cause held that there was a legal presumption of

(b) 5 B. & Ad. 93.

(d) 2 B. & Ald. 386.

(c) 2 A. & E. 540.

(e) 2 A. & E. 544.

life until that time, and directed a verdict for the plaintiff; because, if there was a legal presumption, there was nothing to be submitted to the jury. But this court held that no legal presumption existed, and set the verdict aside. . . . I think the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it?" There is another case, which was not referred to on the argument in the Court of King's Bench—*Patterson v. Black (f)*. There, in an action on a policy of insurance on the life of one Macleane, from the 30th January, 1772, to the 30th January, 1778, it appeared in evidence, that about the 28th November, 1777, Macleane sailed from the Cape of Good Hope in the Swallow sloop of war, which, not being afterwards heard of, was supposed to have been lost in a storm off the Western Islands. In order to prove the death of Macleane before the 30th January, 1778, the plaintiff called witnesses to prove the ship's departure from the Cape, and several captains swore that they sailed the same day; that the Swallow must have been as forward in her course as they were on the 13th or 14th January, when they encountered a most violent storm; and that she was much smaller than their vessels, which weathered it with difficulty. Lord Mansfield left it to the jury to say whether, *under all the circumstances*, they thought the evidence sufficient to convince them that the party died before the expiration of the time limited in the policy; adding that, if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict. There would be many cases in which such a presumption as that which is contended for would materially affect the title to land, and would yet be altogether contrary to the fact. The courts have therefore invariably said that there is no presumption as to the *time*, although there is as to the *fact*, of the death. Here no *evidence* whatever was given to show the time of his death.

But it is said, and the learned judge so expressed his opinion, that, as Sir Evan Nepean took as purchaser from George Knight, his possession was not adverse so long as it was uncertain whether Matthew Knight was alive or dead; that is, not until the end of the seven years. But the *certainty* of his death does not exist even now, although the courts may presume it if legal proceedings

(f) Park, Ins., 8th ed., 920.

are taken. The presumption then made is this, and no more,—that he died *at some time* within the first seven years during which he has not been heard of. It is altogether immaterial that Sir Evan Nepean's possession was not adverse to Matthew Knight, the tenant for life; the moment he died, the possession became adverse to his remainderman. The right of entry accrues to the remainderman, under such circumstances, as soon as he has a right to treat the party in possession as a trespasser—that is, immediately on the death of the tenant for life. The question is, therefore, identical with the former—when, namely, did the death of the tenant for life occur? The statutes of limitations themselves contain no reference to the doctrine of adverse possession, which has been engrafted by the courts upon the statute 21 Jac. 1, c. 16. That statute simply enacts that “no person or persons shall make *any entry* into any lands, &c., but *within twenty years next after his or their title, which shall first descend or accrue to the same*, and, in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from *such entry* after to be made.” In the case, then, of the tenancy of a particular estate, with an estate of remainder, when does the remainderman's title accrue to him? Undoubtedly at the death of the tenant of the particular estate. Suppose Matthew Knight died in 1808, had not the remainderman full right then to enter? The question is not whether the remainderman acquiesced in a continuance of the possession under the tenant for life; that would be a question for the jury. The recent act for the limitation of actions, 3 & 4 Will. 4, c. 27, does not alter the case. The second section enacts that, after the 31st December, 1833, “no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years *next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims*; or, if such right shall not have accrued to any person through whom he claims, then *within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same*.” And the 5th section declares that when the estate or interest claimed shall have been an estate or interest in reversion or remainder, such

right shall be deemed to have first accrued *at the time when it became an estate or interest in possession*. Here the right of entry accrued, and the estate vested in possession, on the death of the tenant for life. The whole case, therefore, resolves itself into the same question, which was determined by the Court of King's Bench—when did that death happen? No doubt some acts of the party in remainder may prevent the possession under the tenant for life from being adverse to himself, as in the case of a void lease for years by the tenant for life, and receipt of rent under it by the remainderman: *Roe d. Brune v. Prideaux* (g); *Denn v. Rawlins* (h); and so of other acts showing a recognition of the continuance of possession; but if no such act be shewn, the occupation is adverse from the death of the tenant for life. If the possession here was not adverse, Sir Evan Nepean was tenant to Paul Slade Knight, otherwise there has been a disseisin. If any such presumption could arise, it was for the jury; but it could not, because Sir Evan Nepean was clearly claiming in his own right, at all events from the death of Matthew Knight. The doctrine of adverse possession was adopted on the principle that the *right of entry did not accrue* until the occupation of the land became no longer permissive, as in the case of landlord and tenant, or of trustee and *cestui que trust*. So, in the case of a joint tenancy or tenancy in common, though each party has a right to come upon the land, he has no right of entry to make a demise to the exclusion of the other party. So also the mortgagor, being in possession with the consent of the mortgagee, in whom the legal estate is vested, is his tenant: *Partridge v. Bere* (i); *Hall v. Doe d. Surtees* (k). Here it is clear there was no occupation *by the consent* of the remainderman. In *Doe d. Parker v. Gregory* (l), where a widow, tenant for life of lands settled upon her by a deceased husband by way of jointure, married again, and levied a fine of the lands jointly with her second husband, and died, and the husband held for more than twenty years after her death, it was held that his possession was adverse against the reversioner after her death, although he had originally come into possession lawfully, because he could have

(g) 10 East, 158.

(h) Id. 261.

(i) 5 B. & Ald. 604.

(k) Id. 687.

(l) 2 A. & E. 14.

been treated as a trespasser immediately on the wife's death. Suppose it were necessary to plead the Statute of Limitations specially, what would the party have to prove under it?—*that his right of entry accrued within twenty years*. The question, therefore, whether the possession was adverse to the tenant for life or not, is immaterial; since the plaintiff's right of entry accrued, and his estate vested in possession, on the death of the tenant for life. If, on the other hand, the question as to adverse possession has reference to a possession adverse as against the remainderman only, that was a question for the jury; but there was no fact from which to infer that it was permissive.

The *Attorney-General*, contra.—The consequence of determining both the points in this case against the lessor of the plaintiff will necessarily be that his time for bringing an ejectment is abridged to thirteen years instead of twenty. He could not bring it until the end of seven years after May, 1807; if he had laid his demise earlier than May, 1814, he must have inevitably failed on this evidence, because the presumption of the *fact* of the death had not yet arisen. The plaintiff is, however, it is submitted, entitled to judgment on both points.

First, as to the question of adverse possession:—This case does not fall within the statute 3 & 4 Will. 4, c. 27. The enactments of that statute had for their object to get rid of the uncertainty as to the law of adverse possession, which formed so great an impediment in the tracing of titles. But the fifteenth section saved this case from the operation of the previous sections, giving the further period of five years, during which the doctrine of adverse possession was to remain as before. [PATTESON, J.—That is where the possession was not adverse at the passing of the Act.] It is retrospective through the whole past period, and gives five years more for the purpose of bringing ejectment. Then, how did this case stand under the old law? Matthew Knight, the tenant for life, having become bankrupt, his assignees convey his interest to George Knight; he mortgages to Travers, and Travers assigns his mortgage to Sir Evan Nepean, who becomes possessed of the equity of redemption as well as of the mortgage term. Sir Evan Nepean, therefore, represents George Knight, who represents Matthew. Then, with regard to the actual possession: George Knight occupied the premises till

December, 1807; Way (the tenant under Travers) succeeded, and held till 1814; then came in the tenant of Sir Evan Nepean. It might be contended that, at the time when the 3 & 4 Will. 4, c. 27, passed, there had been no adverse possession at all. Where the possession is at first lawful by the party's entering in his own right, it does not become unlawful by his continuance in possession after the period when he is in possession by right. In *Doe v. Gregory*, the husband did not pretend to hold under his wife: he did not come in lawfully by right. [PATTESON, J.—The whole of that case is, that there may be an unlawful possession which does not amount to a disseisin.] There must be an *ouster*, an intention to disseise, otherwise there is no disseisin; and it has been always held that the statute of 21 Jac. 1 does not begin to run until after an ouster or disseisin. The most familiar example is where there are two sons, and the younger enters and keeps possession; the statute does not run against the elder unless he is actually ousted or disseised: *Reading v. Royston* (m). In *Doe d. Burrell v. Perkins* (n), the tenant for life leased for her life, and died in 1799, and the lessee continued in possession without payment of rent till his death in 1805, when his son took possession, and continued without payment of rent, and in 1807 levied a fine with proclamations; it was held that the remainderman in fee might maintain ejectment against him without an actual entry to avoid the fine, or a notice to determine the tenancy. Lord Ellenborough said, “In order to constitute a title by disseisin, there must be a wrongful entry; but here has been no wrongful entry, but only a wrongful continuance of the possession, therefore there was no disseisin.” [PATTESON, J.—The point of *adverse possession*, as distinguished from disseisin, did not arise there, because the ejectment was brought within twenty years of the death of the tenant for life.] But the doctrine laid down went to the extent that it might have been brought even beyond the twenty years; the validity of the fine depended on the question, whether the possession was adverse or not; and it was held that neither by right nor by wrong the conusor had anything in the premises. The case is altogether at variance with the argument on the other side, that the Statute of Limitations always begins to run from the time when the original right

(m) 2 Salk. 423.

(n) 3 M. & S. 271.

of entry accrues. The same general doctrine, that where the original entry is lawful the mere continuance of possession does not make it adverse, is laid down in many other cases: *Hall v. Doe d. Surtees* (o), *Doe d. Colclough v. Hulse* (p), *Doe d. Souter v. Hull* (q), *Doe d. Smith v. Pike* (r), *Doe d. Roffey v. Harbrow* (s). The case of *Doe d. Foster v. Scott* (t), which was cited at the trial as an authority the other way, turned merely on the construction of a grant of copyholds. On these authorities, if Sir Evan Nepean entered rightfully, as the purchaser of Matthew Knight's life estate, without any intention to disseise, his continuance in possession did not make the statute begin to run. There would be no pretence for considering George Knight's possession adverse, if he himself had held over; and all the others have come in under him. And if the possession of Sir Evan Nepean was the possession of Knight, it followed, as a conclusion of law, that it was not a case of adverse possession, and there was nothing to be left to the jury. Nor *could* Sir Evan's possession be adverse, that is, as claiming by an adverse title, during the seven years while it was uncertain whether Matthew was dead. It is clear he believed him alive in 1808, when he was treating for his life interest; and it is equally clear he never set up any pretence to hold adversely to the remainderman.

Secondly:—It is submitted that the ordinary presumption of law is, that a party lives *during* the period of seven years after he was last heard of. That presumption may be rebutted by circumstances—as by proof that the party was aged or infirm, or exposed to extraordinary peril; and will subsist only in the absence of any circumstances to rebut it. Thus, in *Patterson v. Black*, there was a storm, and probable shipwreck. *Watson v. King* (u), is not in point, because Lord Ellenborough there proceeded on the rule adopted in insurance law, that a vessel proved to have sailed, and not to have been heard of for several years, may be considered as lost: and there is no other decision to support the judgment of the Court of King's Bench in the present case. [VAUGHAN, B.—Is not the presumption rather that

(o) 5 B. & Ald. 687.

(p) 3 B. & C. 757.

(q) 2 D. & R. 38.

(r) 3 B. & Ad. 738.

(s) 3 A. & E. 68, n. ; 1 N. & M. 422.

(t) 4 B. & C. 706.

(u) 1 Stark. 121.

life endures through the seven years, than that it expires within the seven years, according to *Doe d. George v. Jesson* (x) ?] Lord Ellenborough there laid it down, that “the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living.” It is most convenient that such a definite period should be fixed; it draws the line distinctly, and prevents confusion; and the analogy with the several statutes by which such a period is limited is then complete. *Against* the lessor of the plaintiff, the presumption is that Matthew Knight lived seven years from May, 1807; *for* him, the presumption is that he lived no longer. If it be otherwise, this absurdity follows; if this ejectment had been brought within twenty years from May, 1807, it is admitted it might have been sustained; but if it had been brought within *seven* years from that period, the plaintiff must have been nonsuited. The law presumes that the party lives seven years, therefore the action cannot be brought sooner: and that he died at the end of seven years, therefore it may be brought within twenty years after. The demise might be laid the very day after the expiration of the seven years, but not earlier. The question is, is not the same presumption to be made as to the limitation, as is made as to the commencement, of the action? [PATTESON, J.—It does not appear to me to be a matter of *analogy* merely to the stat. of 19 Car. 2, c. 6; that seems to me to be the governing statute on this very subject.] That statute enacts, that where *cestui que vies* shall absent themselves by the space of *seven years together*, they shall be accounted as naturally dead—that is, at the expiration of the seven years. [COLERIDGE, J.—The preamble shows that the inconvenience to be remedied was only the inability to prove the death.] *Rex v. Inhabitants of Harborne* (y) is distinguishable; it only shows that the law will presume that life continues for twenty-five days. [PATTESON, J. referred to *Rex v. Twynning* (z).] There there were conflicting presumptions; but the court admitted the existence of the presumption that life continues for seven years. The *dicta* of the judges, and the convenience of the case, are in favour of the decision now contended

(x) 6 East, 80.

(y) 2 A. & E. 540.

(z) 2 B. & Ald. 386.

for, because otherwise the period of limitation will inevitably be abridged in all such cases to thirteen years; and what inconvenience is there, on the other hand, in holding that such a presumption shall stand until the contrary is proved? [Lord DENMAN, C.J.—Is it quite clear that the late statute does not apply?] It does not apply, for two reasons: first, it is retrospective; secondly, this possession was not adverse. The right construction of s. 15 is, that five years are given if the party needs it. [PATTESON, J.—The direction I meant to give was, that at all events the possession was not adverse until the presumption of the fact of death arose; I certainly should not have taken upon myself to decide, without leaving it to the jury, that there had been no adverse possession at all.]

THE COURT (Sir *W. Follett* not being present) called on

Barstow, in reply.—The argument on the other side ranges itself under two heads:—First, whether the onus of proving the time of the death lay on the lessor of the plaintiff; secondly, whether he has satisfied it or not. The test of the first point is, by supposing a plea putting in issue whether the plaintiff's right accrued within twenty years or not. He must prove all the facts which are necessary to make out his affirmative. At what point does the Attorney-General say the possession became wrongful? It must be so at the time of ejectment brought; but he says it was rightful at first. The argument goes to the extent that the possession has never been adverse at all; if so, the ejectment cannot be maintained at all. The cases cited on the other side are distinguishable. *Reading v. Royston* need not be disputed; because adverse possession for twenty years is evidence of an ouster or disseisin. In *Doe v. Perkins*, the fact of an *adverse possession* is not stated at all; the case did not turn on the Statute of Limitations, but on the effect of a fine, and no sufficient time had elapsed from which to infer a disseisin. The distinction was there taken between a disseisin and adverse possession. It may be that the defendant has no title; but the question also occurs, whether the plaintiff has a right to bring his action, not being barred by the lapse of time. *Hall v. Doe d. Surtees* proceeded altogether on the peculiar condition of mortgagor and mortgagee, which is an anomalous case, and cannot aid the argument on any other question. In *Doe d. Colclough v.*

Hulse, the sole consideration was, whether, under the circumstances, the possession was adverse until the death of a particular party, the ejectment being brought within twenty years after that event. Here it is agreed that the right dates from the death; but the difficulty is to fix the death. In *Doe d. Souter v. Hull*, all that the court decided was, that under the circumstances it was a case of tenancy by sufferance, and not of adverse possession at all. So also in *Doe d. Roffey v. Harbrow*, the adverse possession was negatived by the particular facts of the case. But the present case *does* fall within the 3 & 4 Will. 4, c. 27, and is not within the exception in s. 15, which applies only where the possession was not previously adverse. And the plaintiff must prove positively that he is not barred by the lapse of time, and has no right, by a *primâ facie* case, to shift the onus to the other party.

With respect to the other question, there is no sufficient authority for the existence of the presumption that life endures for seven years. Even if the question be doubtful, the conclusion must be against the lessor of the plaintiff. In the cases referred to, relating to insurance, the precise *time* of the death was not material: if the action had been brought more than six years after the sailing of the ship, and there had been a plea of the Statute of Limitations, those cases would have been analogous. In *Doe v. Jesson*, it was put to the jury to fix the *time* as well as the fact of death, and they fixed it within a period which excluded the seven years, and answered the purposes of the cause. The whole question is, is there any *absolute presumption of law*—can it be stated as a legal proposition that the court must, independently of particular circumstances, infer that life endures for the seven years, and then expires? The necessity for the statutes referred to shows that there was no such rule at common law; and the 19 Car. 2, c. 6, only supplies the proof of the *fact* of death.

Cur. adv. vult.

In Trinity Vacation, the judgment of the Court was delivered by Lord DENMAN, C.J.—The lessor of the plaintiff claimed as grantee in reversion of a copyhold estate on the death of Matthew Knight. Matthew Knight went to America in December, 1806, or early in 1807, and the last account that was heard of him was

by a letter written by him from Charleston, which was received in England in May, 1807. The declaration in this cause was served on the 18th January, 1834. At the trial, evidence was given to show that the defendant came into possession as a purchaser of the interest of George Knight, who held for the life of Matthew Knight.

Two questions arose. First, whether the lessor of the plaintiff was bound to give some evidence as to the precise time of Matthew Knight's death, in order to show that he had brought this action within twenty years of his death; or whether the presumption of his being alive continued to the last moment of the seven years since he was last heard of, when the law presumes that he was dead, and which *was* within twenty years next before the commencement of the action. Secondly, whether, on the supposition that the defendant came in as a purchaser of George Knight's interest, there had been twenty years' adverse possession as against the lessor of the plaintiff.

The learned judge told the jury it was incumbent on the lessor of the plaintiff to prove that Matthew Knight was actually alive within twenty years before the commencement of the action, and that he had not proved that fact by merely showing that seven years since he was last heard of expired within twenty years next before the commencement of the action; on which the counsel for the lessor of the plaintiff tendered a bill of exceptions. The learned judge also told the jury, that if they were of opinion that the defendant took as purchaser of the interest of George Knight, his possession had not been adverse for twenty years, because it could not be adverse as long as it was uncertain whether Matthew Knight was alive or not, which it was up to May, 1814. Upon this the counsel for the defendant tendered a bill of exceptions. The jury found that it was not proved that Matthew Knight was alive within twenty years, but that it did not appear that there was an adverse possession of twenty years; and, under the learned judge's direction, they found their verdict for the lessor of the plaintiff.

It seems the statute of the 3 & 4 Will. 4, c. 27, was not adverted to at the trial, but only on the case being argued before the court. We are all clearly of opinion that the second and third sections of that Act (which came into operation on the first of

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January, 1834, seventeen days before this action was commenced) have done away with the doctrine of non-adverse possession, and, except in cases falling within the fifteenth section of the Act, the question is, whether twenty years have elapsed *since the right accrued*, whatever be the nature of the possession. The right of entry in this case accrued on the death of Matthew Knight. Then, as the first and second questions were identical, the learned judge was wrong in putting any distinct and separate question to the jury on the nature of the possession, unless the case be within the fifteenth section.

Now, that section applies only where the possession was not adverse, according to the former state of the law, at the time of the passing of the Act—that is, the 24th July, 1833. If that point had been raised at the trial, it is plain the jury would have been satisfied that the possession was adverse on the 24th July, 1833; for we know, by the report of *Doe d. Knight v. Nepean*, that an action had been brought and tried between the same parties some time before that date. Whether, therefore, the learned judge took a right view of the defendant's possession or not, under the former state of the law, is immaterial; the 3 & 4 Will. 4, c. 27, applies to the case, and the direction in respect of which the defendant's bill of exceptions was tendered was therefore wrong.

Still it is necessary to determine the first and principal point in the case, because, if the learned judge's direction was also wrong as to that, the lessor of the plaintiff would be entitled to retain the verdict, although he obtained it on another ground. The court is therefore called on to review the decision of the Court of King's Bench in *Doe v. Nepean*. The doctrine there laid down is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; that if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of.

After fully considering the argument at the bar, we are all of

opinion that the doctrine so laid down is correct. It is conformable to the provisions of the statute of James I. relating to bigamy, more particularly to the statute 19 Car. 2, c. 6, relating to this very matter, the words of which distinctly point at the presumption of the *fact* of death, but not at the *time*: it is conformable also to decisions on questions of bigamy and on policies of insurance, and it is supported and confirmed by the case of *Rex v. Inhabitants of Harborne*. It is true, the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown, for which reason the onus of showing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shown the death by proving the absence of Matthew Knight, and his not having been heard of for seven years: whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive: but the onus is also cast on the lessor of the plaintiff of showing that he has commenced his action within twenty years after his right of entry accrued, that is, after the actual death of Matthew Knight. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time *before* the expiration of the seven years.

It is true, the doctrine will often practically limit the time for bringing the action of ejectment in such cases; and circumstances may be supposed, as of a lease for seven years commencing on

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the death of A., or of a promissory note payable two months after A.'s death, and many other cases which might be put, in which it would be difficult to carry into effect certain contracts, or to have remedies for the breach of them, if the parties interested, instead of making inquiry respecting the person on whose life so much depended, chose to wait for the legal presumption. Such inconveniences may no doubt arise, but they do not warrant us in laying down a rule that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances. No such rule is enacted by the statute, nor is any one authority adduced in which any such rule has been laid down.

It is not necessary to make any election between the beginning of seven years and the end of them, and the period to which the death should be referred, as seems at one time to have been assumed. We adopt the doctrine of the Court of King's Bench, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof.

For these reasons, we are of opinion that the learned judge's direction to the jury, in respect of which the lessor of the plaintiff tendered a bill of exceptions, was correct, and that the verdict ought to have been found for the defendant; but as we cannot order it to be so entered, the result is that the verdict found for the lessor of the plaintiff must be set aside, and a *venire de novo* awarded.

Venire de novo awarded.

TAYLOR *d.* ATKYNS *v.* HORDE.

HIL.—30 *GEO.* 2, *IN B. R. ET DOM. PROC.*

[REPORTED 1 BURR. 60.]

Adverse possession before Stat. 3 & 4 W. 4, c. 27.

IN ejectment brought in Michaelmas Term, 1752, by John Atkyns, Esq. (in the name of Cyprian Taylor) against Robert Atkyns, Esq., the heir-at-law and others; upon the general issue pleaded, and issue joined thereon, and tried at the bar of this court, the jury find a special verdict; which was in substance as follows:—

That Sir Robert Atkyns the elder, Knight of the Bath, on 8th June, 1669, was (amongst divers other messuages, lands, tenements, &c., in Gloucestershire) seised in fee of the manor of Lower Swell and the other premises in question: and, being so seised, made and executed three several indentures (which are set out in the special verdict), one of which is dated the 11th and the two others the 12th June, 1669.

By one of these indentures, which was dated the 12th June, 1669, (which the counsel on both sides, for distinction's sake, called the lesser deed,) made between Sir Edward Atkyns, Knt., one of the Barons of the Exchequer, Sir Robert Atkyns, Knt. of the Bath, Solicitor-General to the Queen, and son and heir apparent of the said Sir Edward, and Dame Mary (wife of the said Sir Robert) Atkyns, of the one part; and Sir Edward Carteret, Knt., and John Lowe, gentleman, of the other part; it is witnessed that in consideration of a marriage thentofore had and solemnised between the said Sir R. Atkyns and Dame Mary his wife, and of her releasing and acquitting a former jointure to her made before marriage, and of a new provision to be had and made for her the said Dame Mary, for and in the nature of a jointure, in bar and recompense of her dower and thirds at the common law, in case she should happen to survive and outlive the said Sir R. Atkyns

her husband, he the said Sir R. Atkyns did thereby covenant and grant to and with the said Sir E. Carteret and J. Lowe, that he the said Sir E. Atkyns, and the said Sir R. Atkyns, and Dame Mary his wife, should and would, before the end of Michaelmas term then next ensuing, levy and acknowledge before the Justices of the Court of Common Pleas at Westminster one or more fine or fines *sur conusance du droit come ceo*, &c., unto the said Sir E. Carteret and J. Lowe, with proclamations, of the said manor of Lower Swell and the other premises in question : which said fine or fines so as aforesaid or in any other sort to be had, levied, and executed of the said manor and premises, alone or together with any other lands, tenements, or hereditaments, by or between the parties to the said indenture, or any of them, alone or together with any other person or persons, were to be and enure, and were thereby declared to be and enure, as to the said manor and all other the premises, to the use of the said Sir R. Atkyns, for life, without impeachment of waste ; and from and after his decease, to the use of the said Dame Mary for life for her jointure and in bar of her dower ; and from and after the decease of the said Sir Robert and Dame Mary, to the use of Sir Robert Atkyns, Knt., son and heir apparent of the said Sir Robert, and the heirs male of the body of the said Sir Robert the son, on the body of Lovis Carteret his intended wife lawfully to be begotten ; and for default of such issue, to the use of the right heirs of the said Sir Robert the father for ever.

And the said Sir E. Atkyns and Sir Robert the father did by this deed covenant with the said Sir E. Carteret and J. Lowe and their heirs, that in case any defect should happen in the said fine and that assurance, or in case there should not be some good conveyance in the law made according to the intent of that indenture, so that by reason of such defect or failure of such conveyance and assurance in law, the said manor and premises, or any part or parcel of them, should not, before the 30th day of November then next ensuing, be sufficiently conveyed according to the intent of the said indenture, then they the said Sir E. Carteret and J. Lowe and their heirs, and all and every other person and persons and their heirs, standing or being seised, or which should stand or be seised of and in the said manor or premises, should and would from time to time and at all times from

thenceforth for ever stand and be seised of and in the said manor and premises, or of so much and such part and parts thereof whereof or concerning which any such defect should happen to be, to the uses, behoofs, intents, and purposes thereinbefore declared, limited, and contained, according to the true intent and meaning of the said indenture, and to none other use, intent, or purpose whatsoever.

One other of these three indentures was a lease, dated 11th June, 1669; and the remaining one was a release, dated 12th June, 1669. This release bore the very same date with the deed already recited (called the lesser deed); and the counsel on both sides agreed in calling this deed of release (for distinction's sake) the greater deed, as this contained the settlement of the whole estate.

By these indentures of lease and release, dated 11th and 12th June, 1669, the release being tripartite, and made between the said Sir Edward Atkyns, the said Sir Robert the father and Dame Mary his wife, Philip Sheppard, Esq., Sir Clement Farnham, Knt., and Edward Atkyns, Esq. (second son of Sir Edward Atkyns), of the first part; the Right Hon. Sir George Carteret, Knt. and Bart., Vice-Chamberlain of His Majesty's Household, and one of His Majesty's most Honourable Privy Council, the said Sir Edward Carteret and the said John Lowe, the Right Hon. Edward Montagu, commonly called Lord Hinchinbrooke (son and heir apparent of the Right Hon. the Earl of Sandwich), Sir Philip Carteret, Knt. (son and heir apparent of the said Sir George Carteret), and Edward Swift, Esq., of the second part; and the said Sir Robert Atkyns, Knt. (the son and heir apparent of the said Sir Robert Atkyns), and Lovis Carteret (one of the daughters of the said Sir George Carteret and of Dame Elizabeth his wife), of the third part;—it is witnessed that in consideration of a marriage thentofore had and solemnised between the said Sir R. Atkyns the father and Dame Mary his wife, and also of a marriage then shortly to be had and solemnised between the said Sir R. Atkyns the son and the said Lovis Carteret, and of the sum of 6,500*l.* paid to Sir Robert the father by the said Sir G. Carteret for the marriage portion of the said Lovis Carteret, and of 5*s.* a-piece to the said Sir E. Atkyns, Sir R. Atkyns the father, P. Sheppard, Sir C. Farnham, and E. Atkyns, paid by the said Sir E. Carteret and J. Lowe, and for a provision to be

had and made to and for the said Dame Mary (wife of the said Sir R. Atkyns the father), for and in the nature of a jointure, in bar and recompense of her dower and thirds at the common law: and also for a provision for the said Lovis Carteret, for and in nature of a jointure, in bar and recompense of her dower and thirds at the common law: and for settling all the manors, lands, tenements, and hereditaments thereafter mentioned, to the several and respective uses, upon the trusts, to the intents and purposes, and with, under, and subject to the provisoes, declarations, limitations and agreements thereafter declared; the said Sir E. Atkyns and Sir Robert the father did grant, release and confirm unto the said Sir E. Carteret and J. Lowe, and their heirs, the said manor of Swell and other the premises in question (as described in the lesser deed), and several other manors, lands, and hereditaments therein mentioned, to hold the said manor of Swell and other the premises in question, to the said Sir E. Carteret and J. Lowe, and their heirs, to the several uses therein-mentioned; which uses (as to the said manor of Swell and other the premises in question) are the same as those before set forth in the lesser deed; *viz.*:—

To the use of Sir Robert, the father, for life, without impeachment of waste;

Remainder, as to the said premises (except timber trees), to Dame Mary for life, for her jointure, and in bar of dower;

Remainder to Sir Robert the son, and the heirs male of his body by the said Lovis Carteret;

Remainder to the right heirs of Sir Robert the father.

And several other parts of the estates were limited thereby to Sir Robert the son for life: remainder to trustees, to preserve contingent remainders; remainder to the said Lovis Carteret for life, for her jointure and in bar of dower, and upon the issue of the said intended marriage, in strict settlement.

In which indenture of lease is contained a proviso in the following words:—

“ Provided always that it shall and may be lawful to and for the said Sir R. Atkyns the father, the said Sir R. Atkyns the son, and the said Lovis Carteret respectively, when they are or shall be respectively seised in possession of the freehold of such of the premises as by virtue of and according to the limitations afore-

said are respectively limited to them for their respective lives, by their respective deed or deeds in writing sealed and delivered in the presence of two or more creditable witnesses, to make any lease or demise, leases or demises, of all or any of the said premises whereof they shall be so respectively seised in possession for life as aforesaid (except of the capital messuage of Sapperton aforesaid, and the said lodge in Pinbury Park aforesaid), unto any person or persons, for one, two, or three lives in possession, reversion, or remainder, to end or determine upon the death of one, two, or three persons, or for the term of 21 years absolute ; so as there be not, in the respective premises, or any part thereof, any estate exceeding the term or time of three lives, or 21 years, in being at the same time ; and so as such respective leases be not made without impeachment of waste ; and so as the usual rents of such of the premises respectively as shall be so leased or demised upon fines, and the best rents that can be reasonably gotten for such of the premises respectively as shall be so leased or demised without fines, be respectively reserved upon every such respective lease or leases, demise or demises, to be payable during the respective terms in the said respective leases or demises to be contained ; anything hereinbefore contained to the contrary notwithstanding.”

And another proviso is therein also contained, in the following words ; *viz.* :—

“Provided also that it shall and may be lawful to and for the said Sir R. Atkyns the father, at any time or times during his natural life, after the decease of the said Dame Mary his wife, by any writing or writings indented, under his hand and seal, testified by two or more witnesses, to grant, assign, limit or appoint the said manor of Swell Inferior, *alias* Nether Swell, and the lands, tenements, and premises in Swell Inferior, otherwise Nether Swell, Upper Swell, and Stowe in the Wold, and in either or any of them, or such parts or parcels thereof as he shall think fit, unto or to the use of such woman or women as he the said Sir R. Atkyns the father shall marry or take to wife after the decease of the said Dame Mary his now wife ; for and during the term of the natural life or lives of such wife or wives only, for her or their jointure or jointures ; anything herein contained to the contrary thereof in anywise notwithstanding.”

And by another proviso in this deed, the like power is given to Sir Robert the son, "to make a jointure of all or any of the lands thereby limited to Lovis Carteret for her jointure, on any future wife or wives whom he should marry, after the death of the said Lovis Carteret without issue."

And by the same deed, Sir Robert the father covenants with Sir G. Carteret, that Sir E. Atkyns, he, and Dame Mary his wife, would, before the end of Michaelmas term then next, levy one or more fine or fines *sur conusance de droit*, &c., with proclamations, of the premises contained in this indenture, unto the said Sir E. Carteret and J. Lowe; which, it was thereby declared, should be and enure to the several and respective uses, upon the trusts, and to the intents and purposes, and with, under, and subject to the provisoes, declarations, and agreements thereinbefore declared, limited, and expressed concerning the same. And reciting that "Sir C. Farnham and Edward Atkyns were possessed of the premises in question, or several parts thereof, for several terms of years then in being, in trust for Sir Robert the father:" it was thereby declared and agreed by Sir Robert the father, that Sir C. Farnham and E. Atkyns should stand possessed of the premises comprised in the said terms, during the residue thereof, upon trust and to the use and benefit of the person or persons to whom the premises (by virtue of the limitations therein) should belong.

The jury found that the first of the said indentures was executed by Sir E. Atkyns, Sir R. Atkyns the father, and Dame Mary his wife, and J. Lowe; the second of the said indentures was executed by Sir E. Atkyns, Sir Robert the father, P. Sheppard, Sir C. Farnham, and E. Atkyns, Esq.; and the said indenture of release, by Sir E. Atkyns, Sir Robert the father, Dame Mary his wife, Sir C. Farnham, E. Atkyns, Esq., Sir G. Carteret, Sir P. Carteret, E. Swift, Sir R. Atkyns the son, and Lovis Carteret; and that the lease for a year was executed before the release.

That in Trinity Term, 1669, a fine was levied; wherein the said Sir E. Carteret and J. Lowe were plaintiffs, and the said Sir E. Atkyns, Sir Robert the father, and Dame Mary his wife, deforciant, of the premises in question (amongst the said other lands contained in the greater deed): but no fine was ever levied of the lands contained in the little deed only.

Afterwards, on 6th July, 1669, Sir Robert the son was married to the said Lovis Carteret. Dame Mary (the wife of Sir Robert the father) died on 2nd March, 1680.

After which, *viz.* on 26th April, 1681, Sir Robert the father, being seised of the premises in question, as of freehold, for the term of his natural life, without impeachment of waste (and being then on the point of marrying a second wife, Mrs. Ann Dacres), duly executed an indenture under his hand and seal, attested by three witnesses, bearing date the same 26th April, 1681, and made between himself of the one part, and Sir Robert Dacres, Knt., John Dacres, and Ann Dacres, spinster (sister of Sir R. Dacres and J. Dacres), of the other part: by which indenture (after reciting the above-mentioned indenture of release tripartite of the 12th June, 1669, and the power thereby reserved “for the said Sir R. Atkyns the father, after the death of Dame Mary, to limit all or any part of the manor and premises in question, to any future wife or wives he should happen to marry, for the term of the natural life or lives of such wife or wives only, for her or their jointure or jointures”) it is witnessed that in consideration of the then intended marriage between the said Sir R. Atkyns the father and the said Ann Dacres, and of her marriage portion, the said Sir R. Atkyns the father, in pursuance of the said power to him reserved, and of all and every power and authority whatsoever, did grant, assign, limit, and appoint the said manor of Swell, and other the premises in question, unto the said Ann Dacres, for and during the term of her natural life, for her jointure, and in bar and recompense of her dower and thirds at the common law.

On the 28th April, 1681, the said Sir R. Atkyns the father married the said Ann Dacres.

On 31st May, 1698, Sir R. Atkyns the father, being seised of the premises in question, as of freehold for life, without impeachment of waste, executed an indenture of lease, under his hand and seal, attested by three witnesses, dated on the same 31st May, 1698, and made between himself of the one part, and Thomas Dacres, Esq., Robert Dacres, Gent., and John Dacres, Gent. (the three sons of the before-named Sir R. Dacres, Knt., and nephews of Dame Ann Atkyns, then wife of Sir R. Atkyns the father), of the other part. This indenture of lease recites the

indenture tripartite of release of 12th June, 1669: whereby Sir E. Atkyns and Sir R. Atkyns the father did (amongst other lands) grant, release and confirm to the said Sir E. Carteret and J. Lowe, and their heirs, the said manor of Swell Inferior, otherwise Nether Swell, with the appurtenances, and all those rents of assize of the free tenants of the said manor extending to one halfpenny and one pound of pepper; and all the rents of customary tenants of the said manor; and the capital messuage and farm of the Bold; and the park called Swell Park, otherwise Abbot's Wood: and all and all manner of tenths or tithes of the said park; and the barcary or sheep-house called Gannow, and the grounds or closes of meadow or pasture adjoining or belonging thereto; and the water-mill called Bold Mill, with the dams, streams, waters, attachments, fenders, soak, suit, mulcture, grist, and appurtenances thereunto belonging; all the tolls of the customary tenants of the said manor, and all and all manner of tenths and tithes of all the premises whatsoever, which unto the late dissolved monastery of Hales did belong; all that common of pasture for 400 sheep and 20 beasts, upon the hills and fields of Nether Swell, at all times in the year except in the open time, and in the open time common of pasture within the said fields for all manner of beasts without number, rate, or stint; and the several pastures called Murden Leasows; all that barcary or sheep-house within the said pasture; all that pasturage or feeding for 600 sheep, or for more or less at the will and pleasure of the tenant of the said pastures called Murden Leasows for the time being, in and upon the demesne lands, waste lands, and other lands belonging to the said farm of the Bold or elsewhere, in such ample manner as the late abbot of the said dissolved monastery of Hales aforesaid and his predecessors had kept and occupied the same within the manor of Swell aforesaid; all those grounds in Nether Swell aforesaid theretofore in the tenure of John Winsmore or his assigns; all that half acre of land in Nether Swell sometime in the tenure of the curate of the church of Stowe, in the said county of Gloucester; all that fishing of the river or water of the whole manor of Nether Swell, with all profits and commodities to the same belonging; all those portions of tithes whatsoever, and all and all manner of tithe of corn, grain, blade, sheaf, hay, wool, lambs, pasture, and

other tenths and tithes whatsoever in and upon the premises or any part of them growing, renewing, or increasing; (being the premises in question); to the several uses by the said indenture limited as aforesaid: And it also recites the power to the said Sir Robert Atkyns the father, "for leasing the premises," as it is set forth in the said indenture. Then it is witnessed by this indenture of lease, that the said Sir Robert Atkyns the father, in consideration of the rent thereby reserved, in pursuance of the power to him reserved in and by the said recited indenture, and by virtue thereof, and of all and every power and authority whatsoever, did, by that his present writing indented, under his hand and seal, testified by the several witnesses whose names are thereupon indorsed, demise, lease, grant, and to farm let, to the said T. Dacres, R. Dacres, and J. Dacres, and their assigns, the said manor, and all and singular the said lands, tithes, tenements, hereditaments, and premises, with their and every of their rights, members, and appurtenances, in Swell Inferior, otherwise Nether Swell; and all and every the rents reserved upon any leases or grants; to hold to them the said T., R., and J. Dacres, from the making thereof, for and during the natural lives of them the said T., R., and J. Dacres, and the life of the longer liver of them; yielding and paying therefor, during the said term, unto the said R. Atkyns party thereto, and after his decease to such person or persons respectively to whom the said manor and premises were limited, according to their respective estates and titles, the yearly rent of three hundred and three-score pounds, at Michaelmas and Lady-day, by even and equal portions.

In which said indenture of lease is contained a clause in these words, *viz.*:—"The true intent and meaning of this estate or term for lives, so hereby granted and made to the said T. Dacres, R. Dacres, and J. Dacres, and the survivor of them, being to preserve the said remainder so limited in the premises by the said recited indenture to the right heirs of the said Sir R. Atkyns party to these presents, and to such person or persons to whom the said Sir R. Atkyns party to these presents shall in any way dispose of the same, from being barred by any recovery to be suffered, or by any other act to be attempted or done for the barring of the same."

On the 8th June, 1698, John Dacres, one of the lessees in the last above-mentioned indenture of lease, alone, executed a letter of attorney, under his hand and seal, reciting the said last indenture of lease, and empowering and authorising Thomas Barker, Gent., as his attorney, to take livery and seisin of the premises last above-mentioned, from the said Sir Robert Atkyns the father; for himself (the said J. Dacres), and for the said Thomas and Robert Dacres, and every of them, in their names and for their use, according to the purport and true meaning of the said recited indenture of lease; and to enter and take possession of the said manor and premises in the said indenture contained, to the use of them and every of them; he the said J. Dacres allowing of all and every the act and acts so done by the said attorney, to be as effectual and sufficient in law, as if he had been personally present, and had done the same.

On 5th July, 1698, Sir R. Atkyns the father, being so seised as aforesaid, and then in the actual possession of the said manor and premises, did, in his own person, deliver seisin and possession thereof unto the said T. Barker, to the use of the said T., R., and J. Dacres, and of every of them, and of the survivor of them, according to the purport and true meaning of the said indenture; he the said T. Barker being authorised and appointed, by a letter of attorney under hand and seal of the said J. Dacres, and by him duly executed, “for him and to his use and in his name, and for the said T. and R. Dacres, and to their use and in every of their names, to take and receive the said livery and possession of the said capital messuage, manor, and premises accordingly;” as by an indorsement on the said letter of attorney (which is set out in the verdict) appears.

But the jury found that the said Thomas Dacres, Robert Dacres, and John Dacres, the lessees named in the last-mentioned indenture, or either of them, never were in possession of the premises in question, otherwise than by the said livery and seisin so given by the said Sir Robert Atkyns the father as aforesaid; and that they or either of them did not receive or pay any rent for or in respect of the said premises; and that the said indenture of lease was not found in the custody of Thomas Dacres the surviving lessee, at the time of his death.

On 27th May, 1708, Sir R. Atkyns the father, being so seised

of the said premises, and of the remainder and reversion thereof as aforesaid, made his will, dated the same 27th May, 1708, attested by four witnesses; and thereby confirmed his wife's jointure; and then recited "that he was seised of the remainder and reversion in fee of the said manor and other the premises in question; and that such remainder or reversion, after the death of his wife, was also further expectant upon an estate in special tail, settled upon his son Sir Robert upon his marriage, by the above-mentioned deed of 12th June, 1669; and that he had made a lease to the said T., R., and J. Dacres, for their lives, and the life of the longer liver of them, according to the power he had reserved to himself upon the said settlement." After which recital, he disposed of his said remainder or reversion in fee, to the lessor of the plaintiff, in tail male.

The whole devise was in the following words, *viz.*:—"I give and confirm unto my said wife Dame Ann Atkyns all those lands, tenements, and hereditaments in Lower Swell aforesaid, which were settled upon her for her jointure, before our marriage: and I hereby further give and devise to her, for term of her life, my manor of Lower Swell, and all the rest of my lands, tenements, and hereditaments whatsoever in Lower Swell aforesaid, for term of her life, as an addition to her jointure. And whereas I am seised of the remainder and reversion in fee of the said manor of Lower Swell, and of the rest of the said lands, tenements, and hereditaments in Lower Swell, so settled, and by this my will given and confirmed to my said wife for her life: which remainder or reversion, after the death of my wife, is also further expectant upon an estate in the said manor and lands in special tail settled upon my son Sir R. Atkyns upon his marriage, by deed dated the 12th June, 1669, and upon his sons by his now wife and no other wife; and whereas I have made a lease dated (*a*) the 8th day June, 1698, executed by livery and seisin, to T. Dacres, Esq., and to R. and J. Dacres, Gentlemen, for the lives of the said T., R., and J. Dacres, and the life of the longer liver of them, according to a power I reserved to myself upon the said settlement made upon the marriage of my said son Sir R. Atkyns; now I give and devise the said remainder or reversion, and the benefit of the trusts of the said lease for lives,

(*a*) The testator mistakes the date of this lease. It was 31st May.

to my grandson John Tracy (the now younger and second son living of my son-in-law John Tracy, of Stanway, in the said county of Gloucester, Esq., by my daughter Ann, his wife), and to the heirs male of the body of my said grandson by him to be begotten. And if my said grandson happen to die without issue male, then I give and devise the said remainder or reversion to the next younger son of the said J. Tracy, my son-in-law, called Ferdinando Tracy, and to the heirs male of the body of the said Ferdinando. And for default of such issue, then I give and devise the said remainder or reversion to the next younger son my said son-in-law J. Tracy may happen to have by my said daughter, and to the heirs male of the body of such next younger son ; ” and so on, to other still younger sons, &c. (These devises were all upon condition that the said sons respectively so inheriting the said manor and lands should constantly use to call and write themselves by the name of Atkyns only, for their surname, and by no other surname.) And then the will proceeds thus : “ I do further give and devise all my houses, and all lands, tenements and hereditaments, situate, lying, and being in or near Cursitor’s Alley in Holborn, within the city of London or the suburbs thereof, or within the county of Middlesex, or in either of them ; ” in like manner, and upon the like condition, &c. And, reciting that the reversion or remainder of his manor and lands in and of Sapperton aforesaid, and of the advowson of the church of Sapperton, and of and in his manor of Pinbury and of the lands thereto belonging, as also of Pinbury Park, was in him and his heirs ; and also of the seven Hundreds of Cirencester, and of the Hundred of Bisley (all in the said county of Gloucester) ; he devised the same in like manner. The words of his will are these :—“ I have also made a lease for lives of the said manors of Sapperton, and Pinbury, and of the said advowson of Sapperton, and of the said Pinbury Park, and of all the said several hundreds, the better to preserve and support the said remainders and reversion from being cut off or barred by any recovery. And if my said younger grandsons happen to die without issue male, then I give and devise the same reversions and remainders to my nephew Richard Atkyns (eldest son of my late brother Sir E. Atkyns, deceased) and to his heirs.”

On 9th February, 1709, Sir R. Atkyns the father died, seised

of the premises in question. Upon his death, Dame Ann, his widow and relict, entered thereupon ; claiming the same for her life, for her jointure, under and by virtue of the above-mentioned indenture of 26th April, 1681 ; and was in possession thereof.

The jury then find an indenture tripartite, dated the 18th May, 1710, made between Richard Atkyns, Esq. (eldest son and executor of Sir E. Atkyns the surviving trustee in whom the terms for years mentioned in the greater deed were vested) on the first part ; Joseph Walker, Gent., on the second part ; and the said Sir R. Atkyns the son on the third part ; by which, after reciting the indenture of release of 12th June, 1669, and that it was therein mentioned that Sir Clement Farnham and Edward Atkyns were possessed of several terms for years in the premises in question, and that they were to stand possessed thereof in trust for such person and persons to whose use and uses the same were limited by the said indenture ; and reciting that the said Sir R. Atkyns the son then claimed the said manor and premises by and under the said indenture ; and that Sir C. Farnham was dead, and the said E. Atkyns (afterwards Sir Edward Atkyns, Knt., Lord Chief Baron of the Exch.) survived him, and was also then dead, having first made his will, and the said Richard Atkyns executor thereof, and that he had proved the same : the said Richard Atkyns at the instance and request of the said Sir R. Atkyns the son testified by his executing the said indenture, and in consideration of 5*s.* paid to him by the said J. Walker, assigned over the said manor and premises in question to the said J. Walker, to hold to him, his executors, administrators, and assigns, for all the then residue and remainder of the said terms, whereof the said Sir C. Farnham and E. Atkyns or either of them were possessed ; in trust for the said Sir R. Atkyns the son and the heirs male of his body by the before-mentioned Dame Lovis his wife (the said premises being so limited in and by the said indenture of release of 12th June, 1669). In which said indenture there is a covenant from Sir R. the son to indemnify the said Richard Atkyns, his heirs, executors, and administrators, against any damages he or they might sustain by reason of his making the said assignment to the said J. Walker as aforesaid.

The jury further find that, Dame Ann Atkyns being so in possession of the premises as aforesaid, in T. T., 1710, 9 Anne, an ejectment was brought in the Court of Common Pleas, for the recovery of the said premises, against her the said Dame Ann and the tenants in possession of the same premises, by John Philips, upon the several demises of the said Sir R. Atkyns the son and of the said J. Walker: in which ejectment, the demises were laid upon the 22nd May, 9 Anne, to hold from the 20th day of the same May for seven years. And the said ejectment was tried at the bar of the Court of Common Pleas, in Michaelmas Term following: and a general verdict was found for the plaintiff; and judgment was entered up thereupon against her and the rest of the defendants therein, for the said J. Philips; and he recovered *terminum suum predictum*, and had an *habere facias possessionem*.

The jury further find that upon this trial the said two indentures, called greater and lesser deeds, of 12th June, 1669, were, both of them, read and given in evidence to the jury: but that the deed of assignment of 18th May, 1710, was not produced, nor given in evidence, to the jury.

They find that soon after the said judgment in ejectment, and during the life of Dame Ann, Sir R. Atkyns the son entered into and was in possession of the premises in question, and in the said declaration in ejectment mentioned.

They find that on 1st Jan., 1710, J. Philips, the said plaintiff in ejectment, surrendered the two terms mentioned in the said declaration in ejectment to be demised to him by the said Sir R. Atkyns the son and J. Walker, to the said Sir R. A. the son then in possession of the premises.

They further find that on 17th Jan., 1710, the said Sir R. A. the son, being so in possession as aforesaid, and during the lifetime of the said Dame Ann Atkyns, widow, made a feoffment to James Earle, of the premises in question, in fee; by indenture tripartite of that date, made between himself, on the first part: James Earle, yeoman, on the second part: and John Holmden, Gent., on the third part: which feoffment in fee is therein declared to be for the docking, barring, and destroying all estates tail, use and uses, reversions and remainders, at any time theretofore made, created, or limited of and in the manor

and premises in question; and for the vesting and settling an estate in fee simple therein, to and in the said Sir Robert the son. Sir Robert the son did therefore, in consideration of 5s., thereby grant, bargain, sell, enfeoff, and confirm unto the said J. Earle, his heirs and assigns, the premises in question, to hold to and to the use of the said J. Earle, his heirs and assigns, for ever; to the intent and purpose that the said J. Earle might become perfect tenant of the freehold of the said premises, in order for the suffering a common recovery in Hilary Term then next; wherein the said J. Holmden was to be demandant, the said J. Earle tenant, and Sir Robert himself vouchee. Which recovery, it was thereby declared, was to be and enure to the use and behoof of the said Sir R. Atkyns the son, his heirs and assigns for ever; and to or for no other use, intent, or purpose whatsoever. And by this same deed, Sir R. Atkyns the son constituted Edward Carter and John Longford his attorneys and attorney, either jointly or severally to enter upon and take seisin and possession of the premises, and to give and deliver seisin and possession thereof to the said J. Earle and his heirs and assigns for ever, according to the purport and true meaning and for the purposes in the said deed mentioned.

And the jury find that, on the 20th Jan., 1710, E. Carter, one of the said attorneys, entered upon the premises, and gave seisin and possession thereof to the said J. Earle, by virtue of the said warrant of attorney contained in the said indenture: as appears by a memorandum indorsed upon the said indenture, and found by the verdict.

They find that in Hilary Term, 9 Anne (1710), a recovery was suffered of the premises, wherein J. Holmden was demandant; J. Earle, tenant; and Sir R. Atkyns the son and Lovis his wife, vouchees; and seisin executed thereon: which recovery they find to be prosecuted, had, and executed to the several uses mentioned in the said deed of feoffment. And they find that, after this recovery, Sir Robert the son continued in possession of the premises till the 9th Nov., 1711.

They find the death of the said Sir R. A. the son on 9th Nov., 1711, without issue male by the said Lovis his wife, who survived him.

They also find that an ejectment was brought for the premises,

against the present defendant, Robert Atkyns, Esq., and his tenants of the premises in question, in Hilary Term, 1711, 10 Anne, by John Miles, as plaintiff, on the several demises (both laid to be made on the 14th Feb., 8 Anne, 1709, which is five days after Sir R. A. the elder's death), of Dame Ann Atkyns the jointress, and of Thomas Dacres, the surviving lessee under the indenture of lease of 31st May, 1698. And in Easter Term, 1712, 11 Anne, a general verdict was given for the plaintiff, on both demises, on a trial at bar in this court; and judgment was entered up accordingly, "that the plaintiff do recover his several terms aforesaid." And the said Dame Ann Atkyns entered upon the premises in question immediately after this last judgment, and continued in possession thereof till 9th October, 1712, when she died.

Soon after the death of Dame Ann, the (original) defendant, Robert Atkyns, Esq., nephew and heir-at-law to Sir R. A. the son (and also heir-at-law to Sir R. A. the father) entered upon the premises, and continued in possession thereof until his death; which happened on 16th March, 1753. (Robert's death was just three months after the now lessor of the plaintiff's actual entry; and it was after issue joined in this present ejectment.)

John Dacres, one of the lessees in the indenture of lease, dated 31st May, 1698, died in 1705. Robert Dacres, another of them, died in 1706. Thomas Dacres, the third of them, survived the other two, and died on 23rd July, 1752.

They find that John Atkyns, the lessor of the plaintiffs, never was in possession of the premises in question, or any part thereof, nor in receipt of the rents and profits thereof, or any part thereof; nor entered thereupon, till the 15th Dec., 1752; when he made an actual entry into and upon the same; claiming the same as devisee thereof under and by virtue of the will of the said Sir R. Atkyns the father; and ejected, drove out, and removed the said Robert Atkyns, Esq., Charles Coxe, Thomas Horde, &c., therefrom; and was seised thereof as the law requires; and being so seised thereof made the demise to the said Cyprian Taylor the now plaintiff, on the 16th Dec., 1752, to hold from thence for fifteen years; by virtue whereof the said Cyprian Taylor entered on the 18th, and was ejected by the defendants on the 19th.

And then they conclude generally, as usual; submitting the matters of law to the judgment of the court upon the above facts.

This case was argued four several times: first, on Tuesday, 3rd June, 1755, by *Yorke* for the plaintiff, and *Knowler* for the defendants; again, on Tuesday, 11th Nov., 1755, by *Pratt* for the plaintiff, and *Perrott* for the defendants; a third time, on Tuesday, 11 May, 1756, by *Caldecot* for the plaintiff, and Serjt. *Prime* for the defendants; and a fourth time, on Friday, 19th Nov., 1756, by *Caldecot* for the plaintiff, and *Knowler* for the defendants. But it is unnecessary to repeat the three first arguments particularly, because the last includes the general substance of them.

The sum of what was urged on the part of the plaintiff was, that the leasing and jointuring powers existed at the time when they were executed by Sir R. Atkyns the father; that those powers were well executed by him; that the lease and jointure made by him in pursuance of those powers were an impediment to his son Sir Robert the younger's suffering a common recovery; that even supposing that James Earle was a good tenant to the *præcipe*, yet the entry of Dame Ann, the jointress, within the five years, avoided this recovery; and, consequently, that the remainder or reversion in fee, devised to the lessor of the plaintiff by Sir Robert the father, was not barred by the recovery thus suffered by Sir Robert the son. These points were entered into very largely by *Caldecot* and the gentlemen who had spoken before him on the same side.

First, they endeavoured to prove that the powers reserved to Sir R. A. the father by the two deeds of 12th June, 1669, were in being and valid at the time of the execution of the lease to the Dacres; and *secondly*, that they were well executed; and, consequently, that there were estates of freehold subsisting at the time when Sir R. A. the son made the feoffment to Earle; *viz.* Dame Ann's jointure, and the lease to the Dacres. And therefore, *thirdly*, they insisted that these life-estates were impediments to Sir R. A. the son suffering the common recovery. For they denied that Sir R. Atkyns the son was tenant in tail in possession at the time that he made the feoffment to Earle; so that Earle could not be a good tenant to the *præcipe*. And they insisted

(ARGUMENT FOR PLAINTIFF.)

that, even admitting that Sir R. A. the son was tenant in tail in possession, yet he could not upon this naked possession, without the freehold, make a good tenant to the *præcipe*, without the jointress and the lessee for life's joining. And that the court cannot (under 14 Geo. 2, c. 20, s. 1) presume a previous surrender or conveyance of the estates for life in order to make the recovery good.

Fourthly, they further insisted that, supposing Sir R. Atkyns the son was tenant in tail in possession, and also that there was a good tenant to the *præcipe* (so that the recovery was good, as a common conveyance), yet the re-entry of Dame Ann Atkyns, the jointress, within the five years (in 1712), actually avoided this recovery; which, if not void, was at least voidable by the tenant for life: and this re-entry of the tenant for life re-vested all the subsequent estates.

The great stress of the question lies (as they said) upon the tenant to the *præcipe*.

The first point, in order of time, is the validity of the two powers created by the greater deed of 1669.

But there is no ground either for the supposition of a fact, "that the lesser deed must have been executed last;" nor for any inference in point of law, "that it operates to the extinction of these powers."

The fact concerning the priority of execution of the two deeds cannot now be determined by any evidence: therefore presumption must determine it.

Now, one of these deeds is an agreement to execute the other: consequently must have been prior to it. The lesser deed covenants: the greater performs that covenant: therefore the lesser was prior. If it had been executed last, that would have destroyed the very effect of it, and the powers raised by it. Dame Mary was giving up and exchanging her former jointure, and therefore she might desire a single distinct deed to secure her own interest. For which purpose a deed of covenant was the most proper. And there was no need to encumber this lesser deed with the powers inserted in the greater deed: which powers did not concern her. Whereas, in order to support a contrary argument, it is necessary to suppose a new agreement (without,

and even against, any reason for it), to alter and destroy the former agreement. But if the parties had meant so, they would have so expressed it.

However, supposing the lesser deed to have been actually executed last, yet, being all *uno flatu*, the law will order the time, so that the proper deed shall be taken to be anterior, and the other subsequent, according to the reason of the thing and the intent of the parties. *Digges's Case*, 1 Rep. 173; *Albany's Case*, 1 Rep. 107; and 2 Rep. 75, *Cromwell's Case*.

And the operation of the fine will follow the construction of the deed. *Countess of Rutland's Case*, 5 Rep. 26 a.

Therefore, the existence of the powers being established, *the next question* is, "whether they have been well executed?" Dame Mary's (b) jointure has not been objected to; but the lease made to the Dacres has: first, as being without a subsisting power in Sir R. A. the elder, the lessor, to make it; secondly, as being fraudulent, even supposing him to have had power to make it; thirdly, as the livery and seisin was made to the attorney of one only of the three lessees, and not to all three or their joint attorney.

Now, it is true that a tenant in tail in possession may suffer a recovery: so also may a tenant in tail in remainder, if he can get in the tenant for life.

But the original donor may interpose as many estates for life as he pleases, before and prior to the tenancy in tail. And this lease to the Dacres, under the power, is just the same as if it had been originally interposed. And the declaration of the intention will not vitiate the estate limited to these Dacres: if it had been even a condition annexed, in restraint of alienation, such a condition would have only been void, and the estate good. Co. Litt. 24 a; *Corbet's Case*, 1 Rep. 84; *Mary Portington's Case*, 10 Rep. 35 b.

As to fraud—there is nothing fraudulent in this lease. And both the terms have been actually recovered at law.

If Sir R. A. the father's superfluous declaration has any effect, it makes the lease good: and it would have been adjudged good, if it had been called in question whilst it subsisted. 2 *Leon.* 132, *Moore and Savil's Case*.

(b) *Sic* in Burrow, but *quære* Dame Ann's.

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And no one is hurt or defrauded by this lease. Not the jointress: for the full and best rent is reserved. Therefore Cro. Eliz. 5, *Countess of Sussex's Case*, does not affect this case: for there the jointress suffered. Nor is the tenant in tail hurt; for the same reason, as to his rent: and as to the postponing his power to suffer a recovery, it was legal, and might have been done by a real actual demise for life or lives. And the eyes of this court do not pierce further than the shell of the conveyance, not to the design of it. As, in cases of terms to preserve contingent remainders, this court cannot hinder the trustee from destroying them: so of terms to attend inheritances; which this court cannot hinder the mortgagee from getting in. Cro. Car. 190, the case of *Nash v. Preston*, is a strong case to show that the court of law will not meddle with the equity of the case.

Now this lease has pursued the power: and this court will not meddle with the intent.

Leases made by churchmen for the benefit of their families are generally as fictitious as this; and yet they are always allowed to be good.

As to the livery and seisin—this livery to Thomas Barker enured to the use of all the three Dacres, according to the purport and true meaning of the letter of attorney, most explicitly therein expressed, and so declared at the time of the livery by Sir R. A. the elder, who gave it.

This sufficiently appears (as the present infeoffment was by deed) from Bro. Abr., tit. *Feoffements de terres*, pl. 16, 67, 72, and Co. Litt. 48 b, 49 a. But 2 And. 196, pl. 14, *Davy v. Abbott*, is in point: 'tis most exactly the same case as this.

So that the life estates of Dame Ann and of the three Dacres appear to have been well created. Consequently, therefore, a double freehold is sufficiently established; viz. one in Dame Ann, the other in the Dacres.

From hence it follows, *thirdly*, that Sir R. Atkyns the son was by them precluded from suffering this recovery; as he was not tenant in tail in possession at the time of his making the feoffment to Earle. Therefore he was to gain a freehold as he could, by right or wrong; and it may be said that either of them will do.

But even supposing him to have been tenant in tail in posses-

sion, yet Earle was no good tenant to the *præcipe*. When he recovered against Dame Ann, he was not tenant in tail in possession : but he recovered against her upon a supposition “that he was ;” which supposition was grounded therefore upon a mistake. And the terms which Philips recovered as his lessee, and surrendered to him, were both of them fictitious. So that the feoffment to Earle must fall to the ground, having no foundation to support it. And though livery was given to him by Sir Robert, yet Sir Robert himself continued in possession till his death.

Which observations being premised, this part of the case may be considered, first, on Sir Robert’s verdict and judgment against Dame Ann ; and secondly, on his subsequent feoffment to Earle.

First—His entry under the judgment cannot amount to a disseisin : nor had he thereby an estate pursuant to his title, as there claimed by him ; it could not be more than an estate in tail, expectant upon two freeholds. It could not be a disseisin ; because it was an entry under a verdict. In truth he gained only a bare, naked possession without the freehold. And so is the writ of *habere facias possessionem* : and the judgment is “to recover the term” only. And Cro. Eliz. 438, *Bateman v. Allen* (upon a demise the same with that in *Newys and Scholastica his wife v. Larke*, Plowd. 403), also proves this.

Therefore the entry under the judgment in ejectment could give no title to Sir R. A. the son to suffer a recovery : it was a lawful entry, but an unlawful holding, Co. Litt. 57 b. A wrongful withholding is not a disseisin, but a deforcement. Co. Litt. 277 b, 331 b, 354 b, 355, 356. And this is without the freehold.

’Tis like the cases of tenant at sufferance : 12 Assize, 22 ; Co. Litt. 57 b ; 1 Ro. Abr. 659, tit. *Disseisin*, C. pl. 10, 11 ; Cro. Jac. 169, *Butler v. Duckmanton* ; Co. Litt. 270, 271 ; Cro. Eliz. 238, *Allen v. Hill*. All which cases concur to prove “that nothing shall operate by way of disseisin but a tortious entry.”

And there is no middle kind of holding, between a naked possession, that disturbs nothing, and a fee which disturbs everything.

Then, secondly, as to the feoffment to Earle. It gained no estate to Earle. This is a very great point to families, for the preservation of entails. If the contrary construction should

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prevail, even tenants at will might do the same thing. But the line is drawn thus: *viz.*, "that a tenant in tail, with a freehold, may bar; but without it, he cannot." A real feoffment, indeed, may do it; but a fictitious one cannot; but shall be considered as fraudulent and void, like that in Savile, 126, *White v. Bacon*. It is not a discontinuance; *Swift v. Heath*, Carthew, 109, 110. Sir R. A. the son gained no fee by it, to himself; nor any to Earle: and the court will consider it as merely collusive.

That he gained none to himself appears from 1 Brownlow, 230, *Dame Petts's Case*; 2 Inst. 412, 413; Cro. Car. 302, *Blunden v. Baugh*; Bracton, lib. 4, p. 161, 162; Co. Litt. 153; Dy. 62; 11 Assize, 6; *Powsley v. Blackman*, Cro. Jac. 659; *Bull v. Wyatt*, Cro. Car. 388.

That he gained none to Earle is equally true. Earle gained no estate of freehold by this feoffment, either as a wrong-doer or as a disseisor. 1 Ventr. 360, Serjeant Maynard's argument in *Moor v. Pitt*.

He might, indeed, be taken as a disseisor, at the election of the right owner; but not against it. And here was no intention of a disseisin. Cro. Jac. 643, *Ferrers v. Fermor*; 1 Mod. 107, *Fountain v. Coke*. In fact here was no actual disseisin: for Sir R. A. the son continued in possession. Neither was here any force or expulsion. And it is not every entry that is a disseisin; 'tis no disseisin, unless there be an expulsion. Co. Litt. 181; 1 Salk. 246, pl. 2, most expressly.

Considering this feoffment as part of the conveyance of a common recovery, as a common assurance, Sir Robert the younger had no power to make a feoffment.

It is not hereby meant that he could not in fact make a feoffment: every man in possession may do it. But this Sir R. A. the son could not convey an estate of freehold by any rightful conveyance—as fine, release, or bargain and sale. And if he cannot do it by a rightful method, will the law permit him to do it by a wrongful one? Surely not. The possession of a tenant at sufferance is not sufficient to build a title upon. Co. Litt. 278; Cro. Jac. 169; Cro. Eliz. 238.

Common recoveries are now considered as a mere conveyance; and the recoveror is a mere instrument and creature of the tenant

in tail. 2 Rep. 77, *Cromwell's Case*; Poph. 23, *Croker v. Dormer*; Cro. Jac. 643, *Ferrers v. Fermor*; 2 Roll. Rep. 247, S. C. (at the end of it); 1 Mod. 107, *Fountain v. Coke*. So, the known case of copyholds, 4 Rep. 28 a; Coke's *Compleat Copyholder*; and the case in 1 Roll. Rep. 223, *Herbert v. Binion*.

From all which cases it is clearly to be inferred that the whole transaction is one common assurance; that the recoveror is a creature and instrument of the tenant in tail; and that it shall not be considered as a tortious entry and a disseisin, in a common assurance.

Such a feoffment as this may be made by any person in possession; and if this should be established it may be of very mischievous consequence and will introduce a new law, contrary to all former rules and doctrines.

The stat. 14 G. 2, c. 20, considers a common recovery as a common assurance; and has a proviso, "that the person had a title to make a tenant to the *præcipe*." And here is not the least ground to presume that the tenants for life either joined or surrendered their estates.

Now, if the law considers that some persons have this power, and others have not, the law will never suffer that to be done by fraud which cannot be done fairly and regularly. And this whole transaction is fraudulent and collusive, and done *eo animo* to bar the subsequent estates; and is therefore void, as a fraud, within the rule and reason of *Fermor's Case*, 3 Rep. 77 b, which considers an estate made by collusion and fraud as no estate.

Lastly.—Admitting the facts of Sir R. A. the son's being tenant in tail in possession; and also that there was a good tenant to the *præcipe*; yet the re-entry of the jointress actually avoided it, and revested all the subsequent estates.

If the recovery was not absolutely void, but good as a common conveyance, yet it was voidable; and if it was voidable, then it was actually voided by the entry of Dame Ann upon demises laid as far back as 14th February, 1709.

To prove this, they applied the cases in 11 Rep. 51 b, *Liford's Case*; Cro. Eliz. 540, *Holcomb v. Rawlyns*; 1 And. 352, *Butler v. Baker*; Fitzg. 225, *Bunker v. Cooke*; Holt, 748; 1 Rep. 14 b, *Pelham's Case*; and a case in C. B., in H. 12 Ann., *Goodtitle v. Ridsen*.

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It is like the regress of a disseisee, which avoids all intermediate acts by relation.

Knowler, who twice argued this case for the defendants, included in his last argument all that had been or could be urged on that side of the question; and it was to the following effect:—

The main question upon this case is, whether the recovery suffered by Sir R. A. the son be a good recovery. For 'tis insisted by the lessor of the plaintiff, "that the recovery is void, as being suffered by a person who had only a bare possession, and had no power to make a tenant to the *præcipe*." But if the recovery is good, the lessor of the plaintiff can have no title; because he claims under a limitation in fee, expectant on the determination of an estate tail, which is barred by the recovery.

The limitations under which all the parties derive their title are contained in two deeds, dated 12th June, 1669; which from their bulk and for distinction's sake have been called the great deed and the little deed. The great deed is a release, grounded on a bargain and sale for a year: the little deed is a covenant to levy a fine, and a declaration of the uses of the fine.

In speaking to the question, four matters must be taken into consideration; *viz.*:—

1st, the order in which the two deeds were executed; and in what manner they influence each other. And from this consideration it will appear whether the leasing and jointuring powers did exist at the time when they were exercised by Sir R. Atkyns the father.

2ndly, supposing the leasing and jointuring powers did then exist, then whether those powers were well executed by the said Robert the father.

3rdly, supposing they were well executed, then whether the lease or the jointure, made pursuant to these powers, were an impediment to Sir R. Atkyns the son's suffering the recovery.

4thly, if the recovery was good, then whether the re-entry of Dame Ann, under the second ejectment, did avoid it.

First, as to the order in which the two deeds were executed, and in what manner they influence each other.

It is found by the verdict, that Sir R. A. the father, being seised of the estate in question and of several other estates, on

12th June, 1669, made and executed three indentures. By the first he, in consideration of a marriage before that time had with Dame Mary his then wife, and of her releasing a former jointure made to her before their marriage, covenanted that he and the said Mary his wife and Sir E. Atkyns his father would levy a fine to E. Carteret and J. Lowe of the estate in question only, to the use of Sir R. A. the father for life, *sans* waste ; remainder to the said Mary, for life, for her jointure ; remainder to Sir R. A. the son, and the heirs male of his body by Lovis Carteret his intended wife ; remainder to the right heirs of Sir Robert the father.

By the second indenture (taken in the order as they stand in the verdict) the estate in question is bargained and sold by Sir Edward A. and Sir R. A. the father, to Sir E. Carteret and J. Lowe for a year.

By the third indenture, Sir Edward A. and Sir R. A. the father, in consideration of a marriage before that time had between Sir R. A. the father and Dame Mary his then wife, and of a marriage to be had between Sir R. A. the son and Lovis Carteret, and of her marriage portion, and for a provision to be made for Dame Mary, of a jointure, release the estate in question (*inter alia*) to Carteret and Lowe and their heirs, to the use of Sir R. A. the father for life, *sans* waste ; remainder (except timber) to Dame Mary for life, for her jointure ; remainder to Sir R. A. the son, and the heirs male of his body on the body of Lovis Carteret : remainder to the right heirs of Sir R. A. the father. (These are all the limitations in this indenture, concerning the estate in question.) Sir R. A. the father covenanted with Sir G. Carteret (the father of Lovis C.) that for the better securing the estate in question to Sir Edward C. and J. Lowe and their heirs, he and Dame Mary his wife and Sir Edward A. would levy a fine to Carteret and Lowe and their heirs, to the uses before declared.

In Trinity Term, 1669, a fine with proclamations was levied of the estate in question (together with other estates) by Sir Edward A., Sir R. A. the father, and Dame Mary his then wife, to Sir E. Carteret and J. Lowe.

It is not found which of the two deeds was executed first (though it was a matter of fact) ; so that the priority of execution

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must be determined by the court from circumstances and presumptions. The order in which the two deeds stand in the verdict concludes nothing one way or the other; since they are placed there as they were given in evidence.

Then he proceeded to compare the two deeds and to reason upon them; and argued very elaborately, that either the little deed was executed after the great deed; or that the little deed was made with a view to control or correct the great deed: or that the great deed, and the little deed, and the fine, must be considered as one assurance (though not as incorporated, and as one single act): and in either case, there is an end of the leasing power, and also of the jointuring power. And he argued very strenuously, that the fine would extinguish both those powers; because they were powers appendant and annexed to Sir R. A. the father's estate for life, and not collateral to his estate.

Second point or head—Supposing the great deed was last executed, or that it controls or corrects the little deed: then, Whether the leasing and jointuring powers were well executed by Sir R. A. the father.

He chose to say nothing as to the execution of the jointuring power; no circumstances attending the execution of it having been laid before the jury; but confined himself to the other (the leasing power).

Now this lease is void, as against law; being made for no other purpose than to restrain Sir R. A. the son from suffering a recovery. For that restraint is against law.

The power to suffer a common recovery is a privilege inseparably incident to an estate tail: it is a *potestas alienandi*, which is not restrained by the Statute de Donis, and has been so considered ever since *Taltarum's Case*, 12 E. 4, 19, pl. 25. And this power to "suffer a common recovery" cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant.

That it cannot be restrained by condition appears by Co. Litt. 223 b, 224 a, and *Sonday's Case*, 9 Rep. 128. That it cannot be restrained by limitation appears by Cro. Jac. 696, *Foy v. Hynde*; and by *Sonday's Case*, and other books. That it cannot be restrained by custom appears by *Taylor v. Shaw*, Carter, 6, 22.

That it cannot be restrained by recognizance or by statute appears by *Poole's Case*, cited in Moore, 810. That it cannot be restrained by covenant appears by *Collins v. Plummer*, 1 P. Wms. 104. That an attempt to suffer a common recovery cannot be restrained appears by *Corbet's Case*, 1 Rep. 83; *Mildmay's Case*, 6 Rep. 40; and *Pierce v. Win*, 1 Ventr. 321. And that a conclusion to suffer a recovery cannot be restrained appears by *Portington's Case*, 10 Rep. 35.

So that the question is reduced to this: "Whether that can be effected by a lease made pursuant to a power which cannot be attained by a condition, limitation, custom, statute, recognizance, or covenant."

Since the law has been thus careful to preserve this incidental privilege of suffering a common recovery to a tenant in tail, surely it will not permit this new experiment, equally destructive to that privilege, to take place. This is the first attempt of the kind: and it is a sound rule of law, "that what never has been, ought not to be permitted."

The lease is also void, as being fraudulent: for it was made to deprive Sir R. A. the son of the profits of the estate, and of an incidental power over it. And the fraud which made it void was apparent. And as the estates affected by the lease subsisted before the lease was made, the lease was fraudulent at common law.

To prove the lease to be fraudulent he relied on Savile, 126, *White v. Bacon*, H. 32 Eliz.:—In a *formedon*, the tenant pleaded non-tenure: on which the parties were at issue. The jury found "that the tenant made a feoffment to several persons, to their own proper use, before the writ purchased; and that the feoffees never took the profits of the land; but that the feoffor took them until the day of purchasing the writ." And the doubt was whether the feoffment was fraudulent, as against the demandant. And the judgment of the court was, "that it was fraudulent and void." Now, if the feoffee's not taking the profits, but the feoffor's taking them, was a reason for adjudging the feoffment to be fraudulent against the demandant in that case; the lessee's not taking the profits, not paying the reserved rent, nor having the lease in his custody, but the lessor's continuing in possession, and taking the profits to the day of his death, seem in the present case to be full as cogent

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reasons for determining this lease to the Dacres to be fraudulent, against Dame Mary and Sir R. A. the son.

If this case should be answered by saying, "the feoffment therein mentioned was made void by 13 Eliz. c. 5, made against fraudulent grants," the reply would be "that that statute was made in affirmance of the common law;" as appears by *Twyne's Case*, 3 Rep. 82 b. But he argued that the lease was fraudulent, not only at common law, but likewise by the statute. For the marriage of Dame Mary with Sir R. A. the father, and Dame Mary's releasing her former jointure, were a valuable consideration for the estate limited to Dame Mary for life; and the marriage-portion of Lovis Carteret was a valuable consideration, which extended to the limitation to Sir R. A. the son and the heirs male of his body by Lovis Carteret.

Here it has been observed "that if the lease had been called in question whilst it subsisted, it could not have been avoided; but would have been adjudged absolute, for the benefit of the lessees:" and 2 Leon. 132, *Moore v. Savil*, and other books were cited as authorities to support the observation.

Answer—The objection to the lease is, "that it never did subsist," for the reasons which have been mentioned: and if the lease was void from the beginning, 'tis a contradiction to say "it shall be adjudged absolute." And the authorities cited are all of conditions subsequent to the estate, created at the same time with the condition. In which cases there was no objection to the estate (for the estate was allowed to be well created); but the objections were to the conditions, which were subsequent to the estate.

It has been observed farther, "that the eyes of the court do not pierce further than the shell of a conveyance; not to the design of the maker of it." Here, indeed, one must be at a loss for an answer, for want of knowing what the shell of a conveyance is. But there is one thing that appears upon this special verdict, which very much favours, if it does not directly establish, what we have been contending for: and that is, the verdict which is found to have been obtained by Sir R. A. the son against Dame Ann the second wife of Sir R. A. the father: which verdict is a disaffirmance of the leasing and jointuring

powers, and could not have been obtained if those powers had subsisted. 'Tis true, there is a deed found also in the special verdict, which was made between the death of Sir R. A. the father and the bringing the ejectment, and to which Sir R. A. the son is a party; in (c) which deed there is a recital "that Sir R. A. the son then claimed the estate in question, by and under the great deed:" which deed was not given in evidence on the trial of the ejectment. But this finding is a matter of no moment: for the little deed was executed either before or at the time, or else subsequent to the time of executing the great deed. If it was executed subsequent to the execution of the great deed, then the little deed and fine control the great deed, by extinguishing the powers. If it was executed before or at the time of executing the great deed, then the two deeds and the fine may be taken as one assurance. And in that case, the little deed corrects the great one, by limiting the estate in question to Sir R. A. the father, discharged of the powers. And in either case it may be said, with great truth, "that Sir R. A. the son claimed under the great deed." However, supposing the person who drew the deed had mistaken the law, and made a false recital, surely a misrecital of matter of law will not conclude a court of justice. And what Sir R. A. the son's own opinion upon the matter was, will appear by the recent pursuit of his title against Dame Ann; for Sir R. A. the father died in Feb. 1709: and in Trinity Term following Sir R. A. the son brought his ejectment against Dame Ann, who was then in possession of the estate under the jointuring power.

But it having been found "that afterwards Dame Ann brought an ejectment, and recovered the estate, upon two demises, one made by herself and the other by the surviving lessee for life," it hath been insisted that Dame Ann could not have obtained that verdict unless the two powers, or one of them at least, had then existed. To which it may be answered that it does not appear that the little deed was produced in evidence upon the trial of that ejectment. Or perhaps the jointuring power only might then be in question: or there might have been other reasons for the difference in opinion. But, however it might happen, still that verdict is not conclusive.

(c) The indenture tripartite dated 18th May, 1710.

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Here *Knowler* argued that the lease to the Dacres must have determined in 1711, upon the death of Sir R. A. the son without issue male : and that the lessor of the plaintiff was barred of his remedy by this action of ejectment (being an action grounded on an entry), because it was not brought within twenty years after his title accrued, and consequently his entry was not lawful by 21 Jac. 1, c. 16. But these parts of his argument are omitted.

Third point or head.—But supposing the leasing and the jointuring powers did exist, and were well executed by Sir R. A. the father : the matter which falls next under consideration is, “whether the lease or jointure made in execution of the powers were an impediment to Sir R. A. the son’s suffering the recovery.”

The point we shall endeavour to establish is, that Earle, the person against whom the writ of entry was brought, was tenant of the freehold when judgment was given against him in the common recovery. And we shall begin with observing that the jointure or the lease could be no impediment to Sir R. A. the son’s suffering the recovery, because neither of the lessees or Dame Ann were in possession of the estates at the time when Sir R. A. the son made the feoffment to Earle.

(*d*) If the court should be of opinion, on the authority of 2 And. 196, “that the livery under the letter of attorney of John Dacres vested the freehold in his co-lessees as well as in himself and not in himself only,” then we insist that the livery was void, because the lessees were in possession by the deed. For if tenant for life has a power to make leases for lives, and makes a lease for life by livery, the livery is void ; because the lease takes effect by the deed : for by sealing the deed, the power is executed ; 2 Lev. 149, *Wigson v. Garret* ; 1 Vent. 291, *Leicester’s Case*. And the livery being void, the lessees were never in possession : for it is found by the verdict, “that the lessees or either of them were never in possession otherwise than by the livery.”

And as the lease was no impediment, so the jointure could be

(*d*) Note.—Upon his first argument, he had urged (upon the authority of Bro. Abr. tit. *Feoffments de terres*, pl. 67) “that no freehold passed by the livery, to any of the three lessees, except

John Dacres who executed the letter of attorney to take it ; which John dying in 1705, the lease expired then.” But he did not now insist upon this point, but seemed, rather, to give it up.

none. For it is found, “that Dame Ann being in possession by virtue of the deed of appointment, and claiming the estate for her life for her jointure, an ejectment was brought on the demise of Sir R. A. the son and J. Walker his trustee, against Dame Ann and the tenants in possession for the recovery of the estate; and that there was a verdict for the plaintiff, and judgment on it;” and “that a writ of possession was awarded; and that soon after the judgment, and during the life of Dame Ann, Sir R. A. the son entered into and was in possession of the estates, and that he continued in possession to the day of his death.” By this it appears that the jointure and possession of Dame Ann was removed out of the way.

It can be no objection to the legality of Sir R. A. the son’s possession, “that the judgment was not executed by a writ of possession;” since something equivalent to it is found, *viz.*, “that soon after the judgment, Sir R. A. the son entered and was in possession of the estate.” And there is no rule of law more uncontroverted, than, “that a recoveror may enter without a writ of execution, where the demand is certain.” The demandant after judgment in a common recovery may enter or take out execution, at his election; *Shelley’s Case*, 1 Rep. 106; *Portington’s Case*, 10 Rep. 38. Conusee may execute a fine executory (which does not take effect till execution) by entry. The plaintiff may have a re-disseisin, on the Statute of Merton, c. 3 (which gives it after a recovery in an assize of novel disseisin and delivery of seisin by the sheriff), as well where he executes the recovery by entry, as where the sheriff delivers seisin to him. The patron who recovers in *quare impedit* may present without a writ to the bishop; Hut. 66, *Rud v. Bishop of Lincoln*. And the lessor of the plaintiff may enter after recovery in ejectment; 2 Sid. 156. Sir Robert the son being thus in possession of the estate, and the possession which is found to have been in Dame Ann having been removed, the effect and operation of the feoffment come next in order to be considered.

But *Knowler* said, he would, out of the respect due to what came from the court, take notice of an (*e*) intimation of one of their lordships, expressing a desire to hear it argued

(*e*) This had been intimated by one of the judges, at the end of the second argument.

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hypothetically, supposing the less deed to have been first executed, and supposing the powers to have subsisted and to have been well executed, and consequently that Sir R. A. the son was only tenant in tail in remainder: what would be the effect of the entry of such tenant in tail in remainder, under or in consequence of a judgment in ejectment? And he hoped, he said, to make it appear beyond controversy, that Sir R. A. the son, after his entry in consequence of the judgment in ejectment, became tenant in tail in possession; *i.e.*, became seised of an estate tail executed.

The gentlemen who have argued for the lessor of the plaintiff have called the possession of Sir R. A. the son a naked possession. But, he, to maintain his position, would show that the right of possession was in Sir R. A. the son.

There is a sound distinction in law between a naked possession and a right of possession. A disseisor has only a naked possession: the disseisee has the right of possession; for he may enter upon the disseisor. But when a descent is cast, the right of possession is no longer in the disseisee; but is in the heir of the disseisor: for the disseisee cannot enter upon the possession of the heir. So that a right of possession and a right of entry are convertible.

A judgment is an act of law: and whilst it continues in force, it destroys the title of the adverse party. A judgment in ejectment, by which only the possession is recovered, not only destroys the right of possession which was in the adverse party, but gives a right of possession to the recoveror. And if the judgment in ejectment did not produce this effect, the lessor of the plaintiff could not enter, or be entitled to the writ of *habere facias possessionem*; but his having a right to enter and to sue out that writ infers his right to the possession. Whilst the judgment stands in force, it removes an intervening estate out of the way: and during that time, 'tis the same thing as if it had never existed. And the recoveror's right to the possession will continue till the judgment is reversed by error, or falsified in another action. Like the case where the tenant in tail suffers an erroneous recovery: so long as the recovery remains in force, it is a bar to the tail, and the issue in tail has no right to the

estate tail; for if the tenant in tail should disseise the recoveror and die, the issue would not be remitted; because he has but one title to the land (which is the title by descent); and there must be two titles in the same person to make a remitter; Co. Litt. 349 a.

Now the consequence of this is, that the right to the possession and the remainder in tail meeting in the same person, and that person being Sir R. A. the son, the possession and the remainder in tail united, and Sir R. A. the son became seised of an estate tail executed, or (in other words) of an estate tail in possession.

If the nature of an action of ejectment, and the consequence resulting from a recovery in it, be considered, this will appear in a clearer light.

An ejectment is a possessory action; in which almost all titles to land are tried: whether the party's title is to an estate in fee, fee tail, for life or for years, the remedy is by one and the same action. In an action of ejectment, the plaintiff recovers only the possession of the land: and the execution is of the possession only. But if the lessor of the plaintiff recovers only the possession of the land, it may be asked, "how he becomes seised according to his title." To which it may be answered, that when a person is in possession by title (as every person is who enters in execution of a judgment in ejectment, because the law does no wrong), the possession and title unite. For it is a rule of law, "that when a man, having a title to an estate, comes to the possession of it by lawful means, he shall be in possession according to his title:" as where the title is to have a fee, he becomes seised in fee; where the title is to have an estate tail, he becomes seised of an estate tail, and so on; the law casting the estate upon him according to his title. And were it not so, an ejectment would be the most ineffectual remedy for the trial of titles to estates; and it would never answer the purpose for which it was brought into use, if (as the counsel on the other side would have it) the lessor of the plaintiff had no more than a bare possession, after an execution or entry on a judgment in ejectment. But this is not all. For a great absurdity would follow, were it otherwise: a man would have a rightful possession, with an immediate remainder to himself in tail; a notion which never existed till this case came to be debated.

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What is it that converts an estate tail in remainder into an estate tail executed, in any case? Certainly, nothing more or less than the possession's coming to the remainder in tail. For if there is tenant for life with remainder to a third person in tail, nothing comes to the remainderman upon the death of the tenant for life but the possession: for the estate tail was in him before.

And whilst the estate tail continued executed, Sir R. A. the son made the feoffment to Earle; which discontinued the tail, and vested a defeasible fee in him: and the *præcipe*, upon which the common recovery was suffered, being brought against him, and Sir R. A. the son being a party to the common recovery, as vouchee, the common recovery, thus circumstanced, barred the estate tail and the remainders over.

And though Dame Ann falsified the recovery in ejectment brought by Sir R. A. the son, by the judgment in the ejectment afterwards brought by herself, yet that falsification had no other effect upon the estate than to revive her right to the possession. Like the case just now cited, of an erroneous common recovery suffered by the tenant in tail, where, if the issue in tail reverses the common recovery by a writ of error, the reversal revives his title to the estate tail, and consequently he is then tenant in tail, by remitter. So that Dame Ann, by means of the recovery in the ejectment brought by herself, having the right to the possession, became tenant for life again, in possession; with a remainder in fee thereupon expectant to the recoveror in the common recovery, or to the person to whose use the common recovery was declared.

That estates may open and shut, or be spread and expand, as events happen, is not unusual in our law. If an estate is limited to A. for life; remainder to his first and other sons in tail; remainder to A. and the heirs of his body; till A. has issue, he is seised of an estate tail executed: upon the birth of a son, that estate opens, and lets in the son; and A. thereupon becomes tenant for life, with remainder to his son in tail. And this was *Bowles's Case*, 11 Rep. 80. So if lands are limited to all the children, either in possession or remainder, upon the birth of the first child, the whole estate vests in him or her; upon the

birth of another child, the estate opens and takes in that child; and opens in like manner on the birth of every other child; 1 Lord Raym. 310, 311, *Sussex v. Temple*; 2 Vern. 545, *Cook v. Cook*.

But the resolution of the question now under consideration does not altogether depend on the quantity of the estate which Sir R. A. the son had at the time when he made the feoffment. It depends on the quality of the conveyance he made use of.

All the gentlemen who have argued this case on the other side have blended and confounded the several operations of different conveyances, and have not considered them with that distinction and precision that are necessary for the solution of the present question. If due attention were given to the operation of the several conveyances which the law has established, the seeming difficulties of this part of the case would be removed.

All conveyances operate as a feoffment, or as a grant.

A feoffment operates on the possession, without any regard to the estate or interest of the feoffor. A grant operates on the estate or interest which the grantor has in the thing granted. But, to be more particular, according to Lord Coke's enumeration, a man may purchase or convey lands by ten manners of conveyance: *viz.*, by feoffment, grant, fine, common recovery, exchange, release, confirmation, grant of reversion with attornment, bargain and sale, will.

To make a feoffment good and valid, nothing is wanting but possession: and where the feoffor has possession, though it be as bare and naked as the gentlemen would have it, yet a freehold or fee simple passes, by reason of the livery; Poph. 39; Litt. ss. 595, 599, 611, 698; Co. Litt. 336 b, 367 a.

A grant passes nothing, but what the grantor may lawfully grant; Poph. 39; Litt. s. 608.

A fine and common recovery are likened to a feoffment; for one is called a feoffment of record, and the other is said to be in nature of a feoffment of record. That which occasions the likeness between a feoffment, fine, and recovery, is that they all pass a fee, though the feoffor, conusor, or tenant have none; Co. Litt. 9 b. But, to give them this uniform operation, the conusor in the fine, and the tenant to the *præcipe*, must be

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seised of a freehold; *i.e.*, an estate for life at least: otherwise the fine may be avoided, by the plea of "*partes finis nil habuerunt*;" and the recovery, by the plea of non-tenure, *i.e.*, "that the person against whom the writ was brought was not tenant of the freehold, by right or by wrong." By this, it appears that a fine and a common recovery are both void, for want of a freehold. But it nowhere appears, notwithstanding what has been urged, that an estate in the feoffor is necessary to support a feoffment. But it does appear, and I have a great authority for it, that it is no plea in avoidance of a feoffment, to say "that the feoffor has nothing in the land at the time of the feoffment;" because the land passes by the livery. If the operation of the feoffment is questioned, the only plea is, "*N'enfeoffa pas*;" which puts in issue only the livery. This is the opinion, and this is the language of Littleton; 10 Edw. 4, 8, 9.

All other conveyances, as exchange, release, confirmation, grant of reversion, bargain and sale, will, pass nothing but what the grantor may lawfully convey, without livery: and, on that account, are in the nature of a grant. Litt. ss. 606, 607, 609, 610; Hardr. 410, *Edwards v. Slater*. It is the operation of these conveyances, that the gentlemen, in the course of their argument, have applied to a feoffment; but with what propriety, is submitted to the court, upon what is now disclosed.

But it has been said "that such a feoffment as this may be made by any person in possession; and if established, will introduce a new law in Westminster Hall, contrary to all former rules and doctrines."

To which objection the answer is, "that it is most clear that a feoffment may be made by any person in possession;" for 'tis the doctrine the law teaches, and it has been the language of the greatest professors of it. Lord Coke, in his comment on W. 2, c. 25 (which gives a writ of novel disseisin, where tenant for years aliens in fee, by feoffment), grounds his distinction between cases which are within the Act and cases which are not within the Act on possession only. For he says, "Though the act speaks of an alienation by feoffment by a tenant for years; yet it extends to tenant by *elegit*, statute-merchant, statute-staple, tenant at will, and tenant at sufferance, because all these

have a possession ; but it is otherwise of a bailiff, for he has no possession at all." [2 Inst. 413.] This shows how greatly one of the gentlemen is mistaken, when he asserts " that a conveyance of an estate of freehold by a tenant at sufferance would be void," since it appears by the statute, and by the comment upon it, " that a feoffment by a tenant at sufferance (who has no more than a bare possession) will unquestionably pass a freehold." And *Butler v. Buckmanton*, Cro. Jac. 169, proves no more than that the release of tenant in tail to a tenant at sufferance is not good, for want of a privity between them. Besides, a release, as has been already observed, passes no greater estate than the releasor can lawfully convey.

Lord C. J. Holt lays it down as clear law, in *Hunt v. Burn*, H. 1 Ann., " that if the lessee for years makes a feoffment with livery, though the lessor be on the land, protesting against it, yet the land passes, because the lessee was entitled to the possession." And Lord C. J. Holt is supported in his opinion, by *Read v. Erington*, Cro. Eliz. 321, where the question was, " if a feoffment by lessee for years, the lessor being upon the land, was a good feoffment ;" for it was pretended that his being upon the land guarded the land, so that no feoffment could be made. But the court was of opinion that the feoffment was good, " because the lessee hath the sole right to the possession, and livery ought always to be given of the possession."

Notice has been already taken, that it is no plea in avoidance of a feoffment to say " that the feoffor had nothing in the land at the time of the feoffment." Let us here add the form of pleading a feoffment by tenant for life, and tenant for years ; good pleading being an infallible test of the law. If feoffment in fee is pleaded by tenant in fee, the conclusion is, " that the feoffee was, by virtue thereof, seised in fee ;" and the same conclusion is made on the feoffment in fee of the tenant for life and tenant for years, " that by pretext thereof the feoffee was seised in fee." The entry of *Albany's Case*, 1 Rep. 108, is a proof of this.

It appears by *Jenning's Case*, 10 Rep. 43, " that the feoffee of lessee for years was a good tenant to the *præcipe*." In *Smith v. Parkhurst*, or *Dormer and Fortescue*, it was admitted that there would have been a good tenant to the *præcipe*, if Mr. Justice Dormer had made a feoffment. And the question in *Pelham's*

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Case, 1 Co. 14 b, is an admission "that the feoffment of lessee for years will pass a freehold."

"That possession only would support a feoffment," was the doctrine at Westminster Hall in elder times. In Perkins (a book of no mean authority), s. 200, it is laid down as a rule, "that without possession, a man cannot make livery." A feoffment by the lessee for years, though the lessor be upon the land, passes the land; and the reason for this is rendered in the book, "because the lessor had nothing to do with the possession."

It was the law, when lands were devisable only by custom, that a man might devise "that his lands should be sold by his executors." In which case, the lands descended upon the death of the testator to his heir-at-law, and the executors took no interest by the will. Babington, a learned judge, in putting this case, and taking notice of the feoffment of the executors, makes this remark:—"And so," says he, "a man may have a lawful freehold from a person who had nothing in the land; as a man may have fire from a flint, which has no fire in it." And he further illustrates his conclusion with the instance, "that a woman shall recover her dower (which is an estate for life) against a guardian in chivalry, who has no freehold." 9 H. 6, 24.

In 10 H. 8, 10, it is mentioned as a thing notorious, "that those who have no freehold may convey a freehold." The conveyance which will pass a freehold from a person who has none must necessarily be a feoffment, since there is no other conveyance in the law which will produce the like effect.

Before the Statute of Uses, a *cestuy qui use* conveyed the use by bargain and sale, and afterwards levied a fine to a stranger. And the question was, whether the fine was not void, as neither of the parties had anything in use or in possession; for by the bargain and sale, the use was in the bargainee; and nothing was in the bargainor, or in the stranger. It was argued that if this fine was not good, great inconvenience would follow; for that many recoveries had been suffered against the bargainor, after he had conveyed the use. To this Fitzherbert replied:—"It is the folly of purchasers that they do not take a feoffment from the *cestuy qui use*, before the fine is levied; for if they do, the fine will be good. I, for my part," says he, "will never purchase

any land without taking a feoffment ; so that I may be in possession when the fine is levied ; for then the fine will undoubtedly be good." 27 H. 8, 20. The possession here spoken of must be a freehold at least, because nothing less than a freehold will support a fine ; for if neither conusor or conusee have an estate of freehold in possession, remainder, or reversion at the time of levying the fine, the fine is void. The feoffment here spoken of is the feoffment of a *cestuy qui use*, after he had parted from the use, and whilst the freehold and inheritance of the estate was in the feoffees, so that it was the feoffment of a person who had only a bare and naked possession (unaccompanied with right) to a stranger. The feoffment could not have been made good by stat. 1 R. 3, c. 1 ; because, after the bargain and sale, the use was in the bargainee, and the feoffor was no longer *cestuy qui use*. This was the opinion, and this was the practice, of one of the greatest lawyers of the age in which he lived ; for it is said that Fitzherbert and Baldwyn were the greatest lawyers of that age. The observations upon the opinion of Fitzherbert are, that if a feoffment from the *cestuy qui use* to a stranger, after he had conveyed the use, would have made the fine undoubtedly good, the like feoffment would have made a good tenant to the *præcipe* ; and for this plain reason, " because the feoffment passed a freehold." How would this great judge have been surprised to have heard the operation of a conveyance which he relied on as the basis of his title to his estates, doubted and debated ! This case is an additional authority, " that the feoffment of a tenant at sufferance will pass a fee." For after the *cestuy qui use* had conveyed the use by bargain and sale, he was no longer a tenant at will to his feoffees. It is likewise a proof " that the feoffment of a deforceor, who is a wrongful withholder, passes a fee." For after a bargain and sale, the *cestuy qui use* had no right to the possession, but was a wrongful withholder. Upon this, it is submitted, whether the confirmation of this doctrine, by the judgment of the court, will introduce a new law into Westminster Hall contrary to all former rules and doctrines ; or whether it will not rather revive a doctrine almost worn out of memory. It is so long since a feoffment was in common use, that it is no wonder the gentlemen should think the doctrine new, and that the properties of a feoffment should be so little known.

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But it has been said “that the feoffment of tenant in tail in remainder expectant upon an estate for life will not make a discontinuance, though the feoffment was made with the consent of the tenant for life;” and for this *Swift v. Heath*, Carth. 109, 110, was cited. This must be admitted; because a feoffment does not make a discontinuance, unless the tenant in tail is seised of the estate tail in possession. But does this case prove “that a feoffment by a remainder-man, with the consent of the tenant for life, is void?” Nothing less. The question, in the case cited, “whether the feoffment made a discontinuance,” admitted the feoffment to be good; for the doubt was upon the operation of it.

To put an end to the question, there is a case, in which it was determined “that the feoffment of him in reversion or remainder, in the absence of the tenant for life, is a good feoffment. It is in *Dyer*, 340. The case was, that he in remainder in fee enfeoffed a stranger, in the absence of the tenant for life; who neither attorned nor assented to the feoffment, but occupied the estate during his life; and it was holden to be a good feoffment for the fee-simple. Where is the difference between this case and the present? In the case before the court, was not the feoffment made by the remainder-man in the absence of Dame Ann, the tenant for life? Did she ever attorn or assent? And did not she occupy the estate during her life? The only difference that can be pretended between the two cases is, that in one, the remainder-man was tenant in fee; in the other, tenant in tail. But will that make any difference? 'Tis impossible it should; because the feoffment in both cases took effect by the livery.

It has been further said “that Sir R. A. the son could not convey a freehold by a rightful conveyance, as by fine, release, or bargain and sale: and if not by a rightful, he could not do it by a wrongful one.”

Here is a distinction made which was never met with. According to their notion of instruments of conveyance, a fine, release, and bargain and sale, are rightful conveyances; a feoffment, a wrongful one. Whereas it is most manifest that all conveyances are in themselves equally rightful, and are to be made use of according to the nature of the case to which they are applicable; and their being rightful or wrongful does not

depend upon their names or their properties. That a freehold will not pass, by a fine, release, or bargain and sale, from a person who has only a bare and naked possession (for that is the subject we are now upon), does not proceed from those conveyances being lawful ones, but from the nature of those conveyances whose property it is to convey nothing but what the maker of them may lawfully convey; because they operate as a grant. Therefore, to infer from thence “that a freehold will not pass by a feoffment”—a conveyance of a different operation, and whose property is to pass a freehold and fee, by force of the livery—is an inconclusive argument.

Another observation has been made, “that if the law considers that some persons have this power (to make a feoffment), and others have not, the law will never suffer that to be done by fraud, which cannot be done fairly and regularly.”

Answer.—Every one who can get into possession has, and ever had, a power to make a feoffment; and the law makes no distinction of persons. And whenever a tenant in tail in remainder has obtained the possession (whether by right or by wrong), and has done an act, whilst in possession, to make a tenant to the *præcipe*, in order to suffer a common recovery; no instance can be produced, where such act has been adjudged fraudulent, unfair, or irregular.

It is very common, in practice, for tenant for life to surrender his estate to the remainder-man in tail, conditionally; in order to give the tenant in tail in remainder an opportunity to bar the estate tail and the remainders over: and though such surrender is the mere contrivance between the tenant for life and the remainder-man in tail, yet no common recovery was ever avoided on that account.

If tenant in tail in remainder disseises the tenant for life, and during the continuance of the disseisin suffers a common recovery, by their own admission, the common recovery is not avoidable by reason of the disseisin. So, where trustees to preserve contingent remainders during the life of a tenant for years, have conveyed the freehold, to make a tenant to the *præcipe*, in order to give the remainder-man in tail an opportunity of suffering a recovery; there is no instance of such a recovery being set aside at law, upon a supposed practice between the tenant

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for years, the trustees, and the remainder-man in tail. And if a remainder-man in tail who comes to the possession by a wrongful act, or by stratagem and contrivance, may make a tenant to the *præcipe*, in order to suffer a recovery; surely, a remainder-man in tail who comes to the possession by a lawful act may do the same.

Where tenant in tail is party to the recovery as tenant or as vouchee, such recovery is not in the eye of the law either fraudulent or collusive: because the law has made the estate tail, and all the remainders, and the reversion expectant on it, subject to the pleasure of the tenant in tail, and given him a right to bar them all. If a reversioner expectant upon an estate tail could avoid a recovery suffered by the tenant in tail, as fraudulent, collusive, unfair, or irregular, the law would have devised some means for avoiding it; and the reason why there are no such means is, because a reversion expectant on an estate tail is of no consideration in law. A reversion expectant on an estate tail is no assets. The reversioner cannot falsify a common recovery suffered by a tenant in tail: neither is rescit given by the statute W. 2, c. 3, to a reversioner on an estate tail. The reason of all this is, because the estate tail is an inheritance which may continue for ever. There is no provision by the statutes, 32 H. 8, c. 31, and 14 Eliz. c. 8, to preserve a remainder or reversion expectant on an estate tail, as there is when they are expectant on an estate for life, and the tenant for life is only vouched.

But *Fermor's Case*, 3 Rep. 78, has been objected: as if there was no difference between a fine or recovery by tenant for years, tenant for life, or a copyholder, by covin, to the intent to bar the reversioner or the lord of his inheritance, and a recovery suffered by tenant in tail, to the intent to bar the estate tail and the reversion.

It has been matter of surprise to hear the gentlemen mention the statute of 14 G. 2, c. 20, because that statute is made in aid of recoveries, and not to invalidate them; and more especially, as there is a proviso in the Act: "that it shall not be construed to prejudice or affect any question in law, which may arise upon common recoveries, not remedied, or intended to be remedied, by

it; but all such common recoveries are to remain and be of such force and effect as they would have been if the Act had not been made." Besides, there is a proviso in the Act, that no common recovery shall be called in question after twenty years.

The principal argument, which the gentlemen have opposed to the doctrine which we have been endeavouring to support, may be reduced to the head of inconvenience; and they have argued upon it, as if the decision of the question depended on private opinion and not on the law. But the question is not, "What inconvenience will attend the determination either way?" but "What is the law?" The inconvenience (if there be one) arises from the nature and operation of a feoffment; and cannot be avoided, but by taking away that conveyance, or depriving it of an operation which it has been allowed to have by all the sages of the law. But to do this is not in the power of a court of justice; since no maxim of the common law can be abrogated or abolished, but by a legislative authority.

It was once thought to be a great inconvenience, "that a descent immediately after a disseisin should take away the entry of the person disseised." At another time it was thought to be no small one, "that the son should lose his patrimony because he happened to be born out of time." And till lately an heir might have been deprived of his family estate by the warranty of an ancestor who was never in possession of it.

The inconveniences occasioned by the maxims I have just now hinted at were as great as that which is pretended to arise from the feoffment of a tenant in tail in remainder expectant upon an estate for life; and yet they continued through ages of the law, till the legislature took them away. The inconveniences which attended the law in those instances were as universal as any that can be suggested to follow from the doctrine we have been endeavouring to support; and yet courts of justice never thought themselves warranted to depart from the law.

Could the Courts of Common Law have determined "that a descent after a recent disseisin did not take away an entry," without determining, at the same time, "that a descent does not take away an entry?" Could they have determined "that a posthumous child should take, though the estate which was the support of the limitation to it determined before its birth,"

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without resolving at the same time, “that a contingent remainder should take effect, though it did not vest during the continuance or upon the determination of the estate created for its support?” Or could they have determined “that an heir should take an estate, notwithstanding the warranty of his collateral ancestor,” without determining “that collateral warranties did not bind?” And can the court determine, in the present case, “that the recovery is void,” without adjudging “that a feoffment has not the operation which it has had ever since it became a common assurance?”

When the law is doubtful, it is allowable to draw an argument from inconvenience; but where the law is clear and precise, (as it is, “that the feoffment of a person in possession, let him come to that possession how he will, passes a fee”), an argument from inconvenience is not admissible; because it tends to undermine and overthrow the law.

Much has been said of disseisin; and many critical observations have been made upon that subject, in order to show that Sir R. A. the son could not be a disseisor. All that needs be said to them is, that Sir R. A. the son entered by right or by wrong (for there is no medium). And “that he entered and took the profits” is admitted. Now, if he entered of his own wrong, he was a disseisor, for he ousted the tenant for life; and if he was a disseisor, it is agreed there was a good tenant to the *præcipe*. If he entered by right, then (for the reasons already offered) he had power to make a tenant to the *præcipe* by his feoffment. So that, in either case, Earle was a good tenant to the *præcipe*, at the time when judgment was given in the common recovery. And so he was warranted, he said, to conclude that the recovery is good, and barred the estate tail limited to Sir R. A. the son; and consequently the remainder in fee, which was limited to Sir R. the father, and by him devised to the lessor of the plaintiff.

The fourth point or head.—Supposing the recovery to be good, whether the re-entry of Dame Ann, under the recovery and judgment in the second ejectment, did avoid it?

The gentleman who made this question said, “it seemed to be of considerable weight.” Whether it be so or not, we shall see

presently. What he undertook to maintain was, "that the entry of Dame Ann, after she had recovered in the second ejectment, revested her estate for life and the remainder in fee, and put the estate in the same plight it was in before the common recovery was suffered." And to make this out, he compared the entry of Dame Ann, to the regress of the disseisee, which avoids all intermediate acts by relation; and made that instance the foundation of his argument.

Knowler here observed how inconsistent this argument of the gentleman was with his former. The direction and force of his argument under the last head was to show "that Sir R. A. the son entered by title, and could not possibly be a disseisor." The drift of this argument is to prove him to have been a disseisor. This shows how difficult it is to be consistent, when a person would reconcile matters not supportable.

The question is not to be determined by the rule or instance which the gentleman has applied to it: but upon this distinction,—“where the entire estate is defeated,” and “where only part of the estate is defeated by one who has a prior title.” The case which the gentleman puts falls under the first member of the distinction; the present case falls under the second member of it.

The subsisting estate, at the time when Dame Ann entered under the judgment in the second ejectment, was an estate in fee in Robert Atkyns, the nephew and heir of Sir R. A. the son. All the interest that she could derive to herself by force of the judgment in the second ejectment was an estate for life; for she could recover no otherwise than according to her title. And therefore Dame Ann's entry under that judgment could have no other effect than to diminish and lessen the interest of Robert Atkyns, by taking out of it an estate for her life. This will appear by some instances which shall be mentioned.—Tenant for life surrenders his estate to the next remainder-man in tail, conditionally, to enable the remainder-man to suffer a common recovery; a recovery is suffered; and, the condition being broken, the tenant for life re-enters: the re-entry of the tenant for life will not avoid the recovery, and revive the estates that were barred by it. This appears by every day's experience. One of the gentlemen seemed to admit the law to be so, and accounted for it by saying, "It is because the tenant to the *præcipe* [was

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made by force of a rightful estate.” But that is not the reason. The true reason is (what has been already mentioned), “that only part of the estate is defeated by the entry of the tenant for life, and not the entire estate.” A tenant for years, or by *elegit*, can avoid or falsify a recovery, during their particular estates only. A wife can avoid a recovery suffered by her husband alone, as to her title of dower only, and no further. Remainderman in tail, expectant on an estate for life, disseised the tenant for life, and levied a fine with proclamations; the tenant for life entered on the conusee. And it was determined “that notwithstanding the regress of the tenant for life the reversion remained in the conusee, not defeated.” And this was the case of *Okes d. Sturton*, which is cited in Poph. 65, 66. Lessor disseises his lessee for life, and makes a lease for life to another; the first lessee re-enters: he leaves the reversion in the second lessee for life, who shall have the rent reserved on the first lease. *Gloucester’s Case*, cited in *Finch’s Case*. More proofs might be brought to confirm this part of the argument; but in so plain a case, these may suffice. And with them we may conclude that the re-entry of Dame Ann under the recovery and judgment in the second ejectment did not avoid the common recovery suffered by Sir Robert Atkyns the son.

And let it be observed that the arguments made use of have not been drawn from general reasons and reflections, but have been suggested from authorities, and from the experience and practice of learned men.

Upon the whole, he prayed judgment for the defendants.

In reply, it was urged on the part of the plaintiff—

(1st) As to the great and little deeds—That the little deed did not revoke the greater one, or destroy the powers thereby given. Which was supported chiefly by arguments drawn from the deeds themselves.

(2ndly) As to the (*f*) lease to the Dacres being fraudulent, the case in Savile, 126, is not like the present: for here were express legal motives for making the lease; whereas there were none, in that case, for making the feoffment.

(*f*) Here is a like omission as to the determination of the lease to the Dacres, argument concerning the validity and as in the adverse argument.

As to livery—It was not necessary, and therefore void;
1 Ventr. 291.

As to the recovery—The authorities are not *ad idem*.

(3rdly) Nor as to the feoffment. For this is a fictitious possession, and *in nubibus*; not an actual possession. No freehold is recovered in ejectment. So that Sir R. A. the son was not tenant in tail in possession, for want of the freehold. And without being tenant of the freehold, the recovery could not be valid. Mr. *Knowler* admits “that the possession of the bailiff would not do.” And surely this case is stronger than that of bailiff.

As to Cro. Jac. 169, *Butler v. Duckmanton*, the possession of the tenant at sufferance was considered as no possession at all in that case. Therefore we may admit all Mr. *Knowler*’s cases, because they do not come up to the present case of Sir R. A. the son’s possession. Consequently the remainder is not affected by anything done under this nugatory possession.

Dame Ann was tenant of the freehold; and, without disseising her, there could be no tenant to the *præcipe*, who would be tenant of the freehold. Sir R. A. the son did not enter as a disseisor, but as having a title. And he had a title under the judgment to enter. And the estate which passed by the feoffment was according to his right. 2 Ro. Abr. 5; 5 Co. Litt. 52 b. And the warranty extended only to the fictitious title in ejectment. The possession only was transferred to him, not the freehold; and this was a mere naked possession, an accidental possession. Carthew, 110, proves that the remainders were not discontinued for want of a tenant to the freehold. Dame Ann was never out of possession of the freehold. So that the estate which Sir Robert gained by his entry upon Dame Ann could not be an estate tail in possession; because there was a prior rightful estate for life in another person. Therefore it must be an estate tail in remainder.

It is asked, “When he first began to hold over unlawfully?” The answer is—From his first entry.

His entry was not wrongful; therefore he cannot be considered as a disseisor. But he held over unlawfully. ’Tis like a tenant by sufferance; or a man who enters upon the king (who cannot be put out of possession), or a man after the death of his wife, &c. And it is not easy to apprehend the distinction between en-

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tering “under the ejectment,” and entering “in pursuance of the ejectment.” Consequently, his was a mere naked possession, and the freehold remained undisturbed to Dame Ann.

As to the fraud and collusion of suffering a recovery—There is surely such an insufficiency of estate in a tenant in tail in remainder, that he cannot suffer a common recovery. And surely the court will not permit a person who cannot be a tenant to the *præcipe* himself to make a tenant to the *præcipe*. And they strongly urged the vast inconvenience that must attend this doctrine now advanced, “that a tenant in tail in remainder only, who can obtain a mere naked possession, may legally suffer a recovery, and bar the subsequent remainders.”

Fourth point.—As to the re-entry of Lady Ann—The verdict did nothing; it is the entry that revests. It revested her estate, which was an estate for life. Whereas Sir R. A. the son’s entry under his verdict only operated to give him a naked possession; he having no right to an estate tail in possession. And he could not be tenant in tail in possession to one purpose, and in remainder to another. Then her re-entry left him tenant in tail in remainder, as it found him.

In the case in 2 Ro. Abr. 421, tit. *Remitter*, I., pl. 1, the wife entered under an act of parliament, which remitted her.

Fifth point (as to the remedy).—The plaintiff is not barred of his entry by the Statute of Limitations, 21 J. 1, c. 16, for the recoveree was not entitled to suffer a recovery, not being tenant in tail in possession.

As to Dame Ann’s recovery in the ejectment brought by Miles, the demise was laid so far back as to overreach the whole term which Sir R. A. the son had recovered; it was laid so far back as to five days after the death of Sir R. A. the father. And her estate had never been discontinued; nor her right of entry taken away. So that Sir Robert the son was never tenant in tail in possession. The lessor of the plaintiff could not therefore enter until the jointure of Dame Ann was at an end, and her life-estate determined. Neither could he enter, so long as the lease to the Dacres was in being; which did not expire until the death of Thos. Dacres, the surviving lessee, on 23rd July, 1752.

Note.—The last of the four arguments of this case was intended chiefly for the information of Lord Mansfield, who had not heard any of the former. Before it came on, his lordship (having read the case, and seen notes of all the former arguments) sent for the counsel and agents on both sides, and told them that a point occurred to him, which did not seem to have been particularly attended to in drawing up the special verdict, and which he observed had been very little gone into in any of the former arguments; that it seemed to him material; and therefore he wished to have it spoken to; and he chose to apprise them of it beforehand, to avoid further expense and delay to the parties; because if he should defer mentioning it till after he had heard them in court, and if they should omit going fully into that point in their argument, and his lordship should continue to think it material, it must occasion a new argument.

The point was, “Whether, supposing the recovery to be bad, yet the plaintiff’s ejectment was not barred by the Statute of Limitations?” That depended, he said, upon many considerations which he desired them to think of; as, first, whether the lease was made pursuant to the power, or (in other words) whether the lease was void, as not being made pursuant to the power; (2ndly) whether it was not determined upon the extinction of the estate tail in 1711; (3rdly) whether, as this special verdict was found, an objection from the Statute of Limitations was now open to be made. And he mentioned some cases to them, which he desired them to look into.

Accordingly, upon the last argument, the said question was very fully discussed on both sides. But, to avoid prolixity, I have omitted to report these arguments of the counsel; because everything material upon this (*g*) point will appear from the following unanimous resolution of the court given by Lord Mansfield.

LORD MANSFIELD now delivered the resolution of the court (having first stated the case and special verdict).

Sir Robert Atkyns the son being dead without issue male, the reversion in fee, devised to the lessor of the plaintiff, is come into possession; and, consequently, he must be entitled to judg-

(*g*) They fell under the 2nd point.

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ment in this ejectment, unless the defendants can set up a bar to his right, or to his remedy by an ejectment.

They set up a bar to both. In bar of his right, they insist upon the common recovery suffered in Hilary Term, 9 Ann., A.D. 1710. In bar of his remedy, they insist upon the Statute of Limitations.

The common recovery, if duly suffered, certainly destroyed the right of the lessor of the plaintiff. The Statute of Limitations, if his title of entry accrued above twenty years before the 15th December, 1752, has certainly taken away the remedy by ejectment.

The merits, therefore, must depend upon two general questions :

1st. Whether the said common recovery was duly suffered.

2nd. Whether this ejectment is barred by the Statute of Limitations.

As to the first, the objection is, that there was not a good tenant to the *præcipe* ; for Lady Atkyns, the widow of Sir Robert the father, had an estate for life in the premises, and did not join, by surrender or otherwise, in any conveyance of the freehold to James Earle, the tenant against whom the *præcipe* was brought. (There is no occasion to entangle this part of the case with the demise to the three Dacres.)

The defendants contend that there was a good tenant to the *præcipe* upon two grounds : first, because Lady Atkyns had no estate for life, and so Sir Robert the son was tenant in tail in possession. Secondly, suppose she had an estate for life, yet Earle was a good tenant to the *præcipe*, by disseisin : which they endeavour to prove two ways, *viz.*, first, that Sir Robert Atkyns, by his entry, was himself a disseisor, and by his feoffment the 17th January, 1710, conveyed the freehold he had acquired by disseisin to Earle ; and secondly, suppose Sir Robert the son was not a disseisor, yet his said feoffment was a disseisin, and made Earle a good tenant of the freehold by disseisin.

As to the first ground, “that Lady Atkyns had no estate for life,” the whole argument depends upon this proposition, “that the lesser deed was executed after the greater deed ; and, consequently, the power of Sir Robert the father, to make a jointure,

was extinguished by the fine levied in Trinity Term, 1669." But the jury have not found the fact, "which was first executed." Both deeds bear the same date. They are both consistent. They are both manifestly but one agreement, executed by different instruments, to answer different purposes, and to suit (probably) the convenience of one party, who was interested only in a small part of the transaction.

The fine levied in Trinity Term, 1669, pursued both deeds, and comprises all the premises in the greater deed, by which the powers were created.

It never could be the intent to revoke these powers at the instant they were created: by the lesser deed, which makes no mention of them; or by a fine levied agreeable to the greater deed, in which they are contained.

Sir Robert Atkyns, who survived the transaction above thirty years, has shown by many acts that he understood the powers to be well created and subsisting.

If it was necessary, we ought to presume the lesser deed first executed, to support the clear intent of parties, in a family settlement made for valuable consideration: for it is impossible to suppose they could really mean to revoke or extinguish these powers, and take this way of doing it. But, in this case, there is no room for presumption; the internal evidence of the thing itself speaks them to be one transaction; and the same, to all intents and purposes, as if expressed in one instrument.

As the jointress clearly had an estate for life, the next ground is, "that James Earle was a good tenant to the *præcipe* by disseisin."

The better to judge of this question, it may be proper to try to find out what the old law meant by a disseisin which constituted the tenant of the freehold, in respect of every demandant suing out a *præcipe*; although the owner's entry was not taken away. (For where the right of possession was acquired, and the owner put to his real action, there without doubt the possessor had got the freehold, though by wrong.)

All the law concerning disseisins, which is any way applicable to the present inquiry, existed and was in use and practice before the assize of novel disseisin. The assize was introduced (probably from the usage of Normandy, for the Grand Coustumier treats of assizes) in or before the reign of Henry the Second.

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Glanville, who wrote in that reign, calls the great assize a benefit, "*clementiâ principis de consilio procerum populis indultam* (*h*) : " and the (*hh*) Myrrour, fo. 93, says "Glanville introduced it."

Seisin is a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. *Sciendum est feudum, sine investiturâ, nullo modo constitui posse* ; Consuetudines Feudorum, lib. 1, tit. 25 : lib. 2, tit. 1 ; 2 Craig. lib. 2, dieg. 2, (2).

Disseisin, therefore, must mean some way or other turning the tenant out of his tenure, and usurping his place and feudal relation. At the time I speak of, no tenant could alien without licence of the lord. When the lord consented, the only form of conveyance was by feoffment publicly made, *coram paribus curiæ*, with the lord's concurrence. Homage, or fealty, was solemnly sworn ; and suit of court and services were frequently done.

The freeholder represented the whole fee, did the duty to the lord, and defended the whole fee against strangers.

The freehold never could be in abeyance ; because the lord must never be at a loss to know upon whom to call as his tenant ; nor a stranger at a loss to know against whom to bring his *præcipe*. From the necessity of there being always a visible tenant of the freehold, and the notoriety who acted and did suit and service as such, many privileges were allowed to innocent persons deriving title from the freeholder *de facto*.

If the disseisor died : after one year's nonclaim, the descent to his heir gave him the right of possession, and took away the true owner's entry. The stat. 32 H. 8, c. 33, requires five years' nonclaim. The feoffee of a disseisor acquired title and possession, at the time I speak of, by one year's nonclaim. The descent to his heir remains privileged as it was at common law ; for the 32 H. 8, c. 33, extends not to any feoffee of the disseisor, immediate or mediate ; Co. Litt. 256 a. The feoffee of a disseisor was favoured ; because he came innocently into the tenure, by a solemn and public investiture with the lord's concurrence.

But the statute (*i*) *Quia Emptores Terrarum* (which took away

(*h*) Lib. 2, cap. 7.

(*hh*) Cap. 2, § 25, p. 150 ; ed. 1642.

(*i*) 18 E. 1. See Introduction to the Law of Tenures, f. 153 to 157.

sub-infeudations, and gave free liberty of alienation to the tenants of subjects, and to those who held of the king, as of an honour or manor), and other statutes which extended the power of alienation to the king's tenants *in capite*, the frequent leases of feudal services, the statutes of uses and of wills, and at last the total (*k*) abolition of all military tenures, have left us little but the names of feoffment, seisin, tenure and freehold, without any precise knowledge of the thing originally signified by these sounds: the idea modern times annex to freehold, or freeholder, is taken merely from the duration of the estate.

Copyholds, and the customary freeholds in the north, retain faint traces in imitation of the old system of feudal tenures. It is obvious how a man may visibly be the copyholder, or customary freeholder, *de facto*, in prejudice of the rightful tenant. It is obvious, too, that usurping such copyhold or customary tenure is a different fact from a naked possession or occupation of the land.

But whoever will look into the practice of other countries, where tenures subsist with all the solemnities of feoffments and seisins upon every change of a tenant by descent or alienation, and upon every usurpation of the real right, will easily comprehend that, at the time I speak of, it might be as notorious who was the feudal tenant *de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation.

Disseisin was a complicated fact, and differed from dispossessing. The freeholder by disseisin differed from a possessor by wrong. Bracton (*l*), c. 2, De Assisa Novæ Disseysinæ, fo. 160, puts many cases of possession wrongfully taken, which he calls intrusion; because there is no disseisin: "*Possessio quæ nuda est omnino, et sine aliquo vestimento; quæ dicitur intrusio.*" *Vestimento* is seisin, investiture (from whence the Saxon term "vest"), a metaphor the feudists took from clothing: by which they meant to intimate "that the naked possession was clothed with the solemnities of the feudal tenure." A particular tenant, according to feudal notions, was in as of the seisin of the fee, of which his estate was a part. If he alienated the fee (which he could only do by solemn feoffment, with the concurrence of the lord of whom the

(*k*) See 12 Car. 2, c. 24, and 13 Car. 2, c. 7. (*l*) Lib. 4, c. 1, 2.

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fee was held), he forfeited his particular estate, for having betrayed his seisin with which he was intrusted : but on account of the privity and confidence between him and the reversioner, and the notorious solemnity of the act of investiture, his feoffment disseised the reversioner.

Bracton, who wrote in the reign of Henry 3, (before tenants could alien without licence), mentions the disseisin in this case as a necessary consequence, and as a thing which could not possibly be otherwise ; c. 3, De Assisa Novæ Disseysina, 161 b, “*Item facit quis disseysinam, cum quis in seysina fuerit ut de libero tenemento, et ad vitam, vel ad terminum annorum, vel nomine custodiæ, vel aliquo alio modo, alium feoffaverit, in præjudicium veri domini, et fecerit alteri liberum tenementum : cum duo simul et semel, de eodem tenemento et in solidum, esse non possunt in seysina.*” He considers it as impossible for the true tenant not to be put out when the other actually came into his place.

So late as 32 Eliz., in *Matheson v. Trot*, 1 Leon. 209, the distinction upon which the judgment turns is that “Henry Denny gained a wrongful possession in fee, but did not gain any seisin ; so no disseisor ; therefore the descent to his heir is not privileged.”

Nobody can disseise the king ; neither can any one be disseised to the use of the king. The king may be wrongfully dispossessed : but the intruder’s injurious possession is *sine aliquo vestimento*, and called intrusion. The king cannot be made a disseisor ; not because it is wrong (for he may, in fact, withhold the possession of land from a subject contrary to right) ; but the reason seems, according to the feudal system, to be this : a subject never could stand in the king’s seisin or tenure ; and the king never could be in the seisin, tenure, or feudal relation of a subject. By that policy all real property was held, mediately or immediately, of the king : in the king himself all real property was allodial.

The precise definition of what constituted a disseisin which made the disseisor the tenant to the demandant’s *præcipe*, though the right owner’s entry was not taken away, was once well known, but it is not now to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded. For, after the assize of novel disseisin was introduced, the legis-

lature by many acts of parliament, and the courts of law by liberal constructions in furtherance of justice, extended this remedy for the sake of the owner to every trespass or injury done to his real property; if by bringing his assize he thought fit to admit himself disseised.

It lay against advisers, aiders, or abettors, who were not tenants; Co. Litt. 180 b. It lay against the tenant who was no disseisor; as the heir of a disseisor or his feoffee; Stat. Gloucester. It lay for the owner, against the disseisor of the disseisor. The tenant's not being ready to pay rent-seck when demanded, was, for the benefit of the owner's remedy, a disseisin; Litt. s. 233. It lay for outrageous distress; 2 Inst. 412. It lay against guardian or particular tenant, who made a feoffment, as well as against their feoffees; 2 Inst. 413. The stat. of Westm. 2, c. 25, extends it to a man's depasturing the ground of another, or taking fish in his fishery. If one receives my rent without my consent, I may elect to make him a disseisor; Style, 407. If a guardian assigns dower to a woman not dowable, the owner may elect to make her a disseissoress; 24 Ed. 3, 43 (cited in Cro. Car. 306). In a word, for the sake of the remedy—as between the true owner and the wrongdoer, to punish the wrong: and as between the true owner and the naked possessor, to try the title—the assize was extended to almost every case of obstruction to an owner's full enjoyment of lands, tenements, or hereditaments.

The reports of assize can only relate to cases where the owner admits himself disseised.

The law books treat of disseisin with a view to the assize; which was the common method of trying titles till ejectment came in use.

Littleton, who wrote long after the remedy by assize was enlarged by statutes and by an equitable latitude of construction, speaks of disseisins principally as between the owner and trespasser or possessor, with an eye to the remedy by assize.

These are the common places from whence many descriptions have been cited of a disseisin. But such authorities can give little light to the present question, which depends upon the nature of such a disseisin as made the disseisor tenant to every demandant, and freeholder *de facto*, in spite of the true owner. Yet the definitions in the books (though very imperfect) savour

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often of that which originally was an actual disseisin in spite of the owner.

Littleton, in s. 279, defines disseisin with an &c.:—"Where a man enters into lands or tenements where his entry is not congeable, and ousteth him which hath the freehold, &c." The comment says, "every entry is no disseisin, unless there be an ouster of the freehold." And Co. Lit. 153 b, says, "disseisin is putting a man out of seisin, and ever implies a wrong: but dispossession or ejectment is putting out of possession, and may be by right or wrong. . . . *Disseisin est un personal trepass de tortious ouster del seisin.*"

Though the term "disseisin" used happens to be the same, the thing signified by that word, as applied to the two cases of actual disseisin or disseisin by election, is very different. This distinction of disseisin at election is made in *Blunden v. Baugh*, Cro. Car. 303, of which case we have seen a manuscript report, fuller than the printed one. The three judges, with whom agreed the four judges of the Common Pleas, argued and held that "the lessee for years of the tenant at will was a disseisor at the election of the original lessor for the sake of his remedy; but never could be looked upon as the freeholder, or a disseisor in spite of the owner, or with regard to third persons." The manuscript report says, if a *præcipe* was brought against him, he might say, "I am not tenant to the freehold." A variety of like cases are put in Cro. Car. (to which I refer —): in the manuscript report there are more.

When the easy specific remedy was by assize, where the entry was not taken away, the injured owner might, for his benefit, elect to consider the wrong as a disseisin. So, since an ejectment is become the easy specific remedy, he may elect to call the wrong a dispossession.

Where an ejectment is brought, there can be no disseisin; because the plaintiff may lay his demise when his title accrued, and recover the profits from the time of the demise. The entry confessed is previous to making the lease: but there is no real or supposed re-entry after the ejectment complained of. If it was considered as a disseisin, no mesne profits could be recovered without an actual re-entry.

If the lessee for life, or years, makes a feoffment, the lessor may still distrain for the rent, or charge the person to whom it is paid as a receiver, or bring an ejectment, and choose whether he will be considered as disseised. *Metcalf d. Kynaston v. Parry and others*, a case reserved at Salop assizes 25th March, 1742, for the opinion of the Court of Exchequer (who gave judgment in it on the 24th Nov., 1743) was this. Tenant in tail, of lands leased by his father to a second son for lives (under a power), upon his father's death received the rent from the occupier, as owner, and as if no such lease had been made, during his whole life. He suffered a common recovery. It was holden "that this was only a disseisin of the freehold at election; and that therefore he could not make a good tenant to the *præcipe*:" and the recovery was adjudged bad.

Except the special case of fines with proclamations (which stands entirely upon distinct grounds), and the construction of the stat. 4 H. 7, c. 24, for the sake of the bar, I cannot think of a case where the true owner, whose entry is not taken away, may not elect (by pursuing a possessory remedy) to be deemed as not having been disseised.

The consequences of actual disseisins, considered as such, continue law to this day. The disseissee cannot dispose or devise: the descent takes away his entry. There are two cases cited in *Blunden v. Baugh*, material to this point. *Powsely v. Blackman*, B. R., Trin. 18 Jac., Rot. 1230, Palmer, 201, which is more fully stated in the manuscript report than in Croke (*m*). The case (in effect and operation) was this. Tenant at will made a lease for years: the original lessor devised. Though the lease by tenant at will at the election of the original lessor was a disseisin, yet they adjudged his devise good; because he had not elected to admit himself disseised; and, by making a will, intimated the contrary.

Another case (not in the report in Cro. Jac., but cited in the manuscript) was in the 14 Eliz.: Sir Ambrose Cone, of his own head, entered into lands of Sir William Hollis, and paid Sir William afterwards a certain rent, claiming to hold as tenant at will, and died. His heir entered: upon whom Sir William entered. It was adjudged "that at the election of Sir William,

(*m*) See Cro. Jac. 659.

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Sir Ambrose was a disseisor : but as Sir William had not determined his election before the death of Sir Ambrose, and entered upon his heir, it was no disseisin : and, consequently, the descent no bar to his entry."

In *Powsely v. Blackman*, Palmer, 205, it is said, "if a disseisee devise, and afterwards enter, the devise is good ;" which Dodderidge denied, and said there must be a new publication ; which seems right, if there ever was a disseisin ; for, where an actual entry is necessary, it will not make good a conveyance made before ; as it was holden in B. R. and Dom. Proc. in *Berrington v. Parkhurst* (n). The actual entry could not support the lease made before. Yet in (o) Salk. 237, it is agreed, "the devise is good, because he was seised *ab initio*, so as he might bring trespass : " *i.e.*, he never was disseised at all, by his election ; and he might make that election without an entry ; he might bring his ejectment, he might bring trespass, without a re-entry. If it was not for this doctrine of election, what a condition would men be in !

In *Powsely v. Blackman* there was no entry ; and after much argument it was at last resolved unanimously by the whole court, from the inconveniences which would be introduced if a lessee by a secret contract with a stranger could defeat the will of his lessor, "that the devise was good." And in the manuscript report, where it is cited, one point said to have been resolved is, "that the owner, by making a devise, showed his election not to be disseised."

I will now consider whether James Earle can be deemed a good tenant of the freehold by disseisin.

Disseisin is a fact. It is not found : all the jury say is, "that soon after the judgment in ejectment Sir Robert entered and was in possession." This must be taken to be an entry in consequence of the judgment ; it was so considered upon settling the special verdict ; otherwise the defendants have no case ; for it is not found that Lady Atkyns was ever ousted, or quitted the possession, or that Sir Robert ever was seised.

Taking possession under a judgment in ejectment never could be a disseisin of the freehold.

(n) May, 1738 ; 4 Bro. P. C. 85.

(o) *Bunter v. Coke*, 1 Salk. 237.

Suppose it a real proceeding—the termor of a disseisee might, at the old law, recover against the disseisor: he might recover against the feoffee of his lessor; but he never could thereby become a disseisor of the freehold: he never could be other than a termor, enjoying in the nature of a bailiff, by virtue of a real covenant. In respect of the freehold, his possession enured always by right, and never by wrong. If the lessor had infeoffed, it enured to the alienee; if the lessor was disseised and might enter, it enured to the disseisee; if his entry was taken away, it enured to the heir or feoffee of the disseisor, who in that case had the right of possession.

Suppose the proceeding (as it is) a fictitious remedy: then in truth and substance a judgment in ejectment is a recovery of the possession (not of the seisin or freehold), without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it in truth and substance can only be possessed according to right, *prout lex postulat*.

If he has a freehold, he is in as freeholder. If he has a chattel interest, he is in as a termor; and in respect of the freehold his possession enures according to right. If he has no title, he is in as a trespasser; and without any re-entry by the true owner is liable to account for the profits.

It is found that the ejectment was brought by Sir Robert Atkyns to recover the possession, but it is not found that he claimed the freehold.

The title must now be taken as in this special verdict. Therefore it appears he had no right to the possession. His feoffee could be in no other condition than himself: he had a possession without prejudice to the right: and could convey no other. He was not in as a particular tenant; there was no privity of any seisin; he had only a naked possession (*p*).

(*p*) Note (*by Mr. John William Smith*): With reference to this part of the judgment, the reader is requested to peruse the celebrated note of Mr. Butler, 1 Inst. 330 b, where the learned editor controverts Lord Mansfield's doctrine, and argues that livery of seisin, made by any person having the possession, necessarily transferred the freehold: see also *Doe d. Blight v. Pett*, 11 A. & E. 842.

With regard to the meaning of the word *disseisin*, here so much canvassed by his lordship, it certainly has been used by the courts and text writers in senses so various as to create a good deal of embarrassment. It is used sometimes to denote a *disseisin at election*; sometimes *the acquisition of a*

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But the case is still stronger. The true owner cannot even *tortious freehold*: and in the latter sense it seems sometimes to be applied to denote any acquisition of a tortious freehold: at other times to bear the confined meaning of the acquisition of a freehold by tort, by means of an entry on and *ouster* of the former freeholder: thus in *Reading v. Royston*, 2 Salk. 423, it is laid down that "the statute of limitations never runs against a man but where he is actually *ousted* or *disseised*;" a proposition obviously untrue if we were to understand *disseised* in the confined sense: since it is manifest that the statute ran in every case where a tortious freehold was acquired by abatement or intrusion. On the other hand, the word *disseisin* is frequently used in the confined sense; for instance, in Sir William Blackstone's Commentaries, where, in conformity to Co. Litt. 277 a, it is explained to be "an attack on him who has the real freehold and turning him out of it;" and Sir William expressly distinguishes it from *abatement* and *intrusion*, saying, "Those were an *ouster* from a freehold in law, this is an *ouster* from a freehold *in deed*;" Acc. 1 Inst. 277 a. Numerous other examples might be given in which the word *disseisin* is used in the *general* sense, and as many in which it is used in the *confined* sense.

This species of confusion seems to have proceeded from the etymology of *disseisin*, which being compounded of the privative particle *de* and the word *seisin*, signifies nothing more than *to put out of the seisin*, whether in law or in deed, whether with force or without force. And such being the etymology of the word, law writers appear very early to have made use of it as a *nomen generale* comprehending every particular mode of interference with the seisin; thus in 1 Roll. 659, pl. 7, it is stated "that if a man *disturbs the entry* of him who has a right unto land, it will be a *disseisin*." Yet this will include the cases of *abatement* and *intrusion*. Thus, too, anyone reading the chapter of the 1st Institute upon *releases*, will find many things predicated there of *disseisor* and *disseisee*, which must be meant to apply to every person wrongfully acquiring or put out of a freehold. And, indeed, Littleton himself seems to have been conscious of this; for when he undertakes to define *disseisin*, s. 279, he says, "*Nota, que disseisin est properment l'ou un homme entra en ascuns terres ou tenements l'ou son entry n'est pas congeable et ousta celui que ad franktenement.*" It is clear from his use of the word *properment* that he was conscious of some other sense in which the word was used, though, perhaps, not "*properly*" so. And indeed this seems to have been so almost *ex necessitate*; for I am not aware that such a word, for instance, as *abatee* ever existed by which the character of the heir or remainder-man abated or intruded on could have been denoted. Now the above consideration reconciles very many of the apparent discrepancies in the books regarding the necessity of a *disseisin* in order that the time of limitation might begin to run; for, taking the word *in its general sense*, it would be true, as laid down in *Reading v. Royston*, that the statute never ran against a man but when he was actually *ousted* or *disseised*: and, taking it *in its confined sense*, it would be also true, as stated by Lord Ellenborough in *Doe v. Perkins*, that in order to constitute a title by *disseisin* there must be a wrongful *entry*, but that a wrongful *continuance* in possession is no *disseisin*. Whereas in 1 Roll. 659, pl. 15, it is laid down that "if guardian *continue* possession after the full age of his ward, he will be a *disseisor*." A passage which is the more remarkable, because Lord Coke, 1 Inst. 57 b, calls the same person an *abator*.

elect to make a person in possession under a judgment in ejectment a disseisor. He could not bring an assize of novel disseisin; the entry is not *injuste et sine judicio*, but under authority of a court of justice and lawful; therefore not liable to punishment by fine (as every disseisin was).

The true owner may enter upon a disseisor: but after a judgment in ejectment an actual entry would not be permitted. If there had been an election in this case, the true owner elected "not to be disseised," and recovered by ejectment: which, if there had been a disseisin, would have purged it.

But there is still behind (though it happens not to be necessary) a larger ground upon which to determine this question, and more satisfactory, because more intelligible; from the nature of a common recovery now, and a feoffment to make a tenant to the *præcipe* with that view only.

The sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually unalienable. The utility of the end was thought to justify any means to attain it.

Nothing could be more agreeable to the law of tenures than a male fee unalienable. But this bent "to set property free" allowed the donee, after a son was born, to destroy the limitation, and break the condition of his investiture.

No sooner had the statute de Donis repeated what the law of tenures said before, "that the tenor of the grant should be observed," than the same bent permitted tenant in tail of the freehold and inheritance to make an alienation, voidable only, under the name of a discontinuance. But this was a small relief.

At last, the people having groaned for 200 years under the inconveniences of so much property being unalienable: and the great men, to raise the pride of their families, and (in those turbulent times) to preserve their estates from forfeitures, preventing any alteration by the legislature: the same bent threw out a (*q*) fiction in *Taltarum's Case* [12 E. 4, 19]: by which tenant in tail of the freehold and inheritance, or with consent of the freeholder, might alien absolutely.

Public utility adopted and gave a sanction to the doctrine, for

(*q*) Pigot on Common Recoveries, pp. 7, 8, 9, 10.

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the real political reason "to break entails:" but the ostensible reason, from the "fictitious recompense," hampered succeeding times, how to distinguish cases which were within the false reason given, but not within the real policy of the invention. Till at last the legislature applauded common recoveries, and lent their aid by the Acts of 11 H. 7, c. 20; 32 H. 8, c. 31; 34 & 35 H. 8, c. 20; 14 Eliz. c. 8; and lately 14 G. 2, c. 20 (which is a retrospective and declaratory law, and seems to have restored the original tenant to the *præcipe*). Before the statute of *Quia Emptores Terrarum*, subinfeudations, whereupon rents and services were reserved, did not prevent the *præcipe*'s lying against the freeholder of the seignory. When common leases to farmers, for one or more life or lives, reserving rent, came in use, they for that purpose, resembled subinfeudations, and ought not to prevent the *præcipe* being brought against the owner of the freehold under which such leases were granted.

As the legislature has for ages avowed the proposition, we may now say "that common recoveries are a mere form of conveyance." All necessary circumstances of form and ceremony are taken from its fictitious original.

The policy of this species of alienation meant to take a middle way as to entails, between perpetuities and absolute property. Alienations were allowed, yet in such a shape as necessarily required deliberation and delay: and they were only allowed to be made by tenant in tail in possession: or by tenant in tail in remainder, with consent of the owner of the first estate for life. The eldest son was restrained in the lifetime of his father, or mother, or any other ancestor or relation, seized for life under a family settlement.

The Act of 14 G. 2 proceeds upon the parties to a recovery having power to suffer it. Sir Robert Atkyns (the son) had no right to suffer a common recovery without the concurrence of the jointress. Any contrivance to do it without her joining is artifice and evasion.

If tenant in tail in possession is disseised: though the *præcipe* be brought against the disseisor, yet, if he is vouched, the recovery shall bar; because he had power to bar. In *Lincoln College's Case*, 3 Rep. 59, the judges support the collateral

warranty of Sibil; because she and Edward had power to bar. In *Jenning's Case*, 10 Rep. 44, the recovery is supported because the parties had power.

By parity of reason, this recovery ought not to be supported, because the parties had no power. If it was, the law must be overturned. Every remainder-man in tail might easily get a naked possession, and make a secret feoffment.

The plan of marriage and other family settlements is "to limit a remainder to the first, and every other son in tail." The negative which the father now has upon the eldest son's suffering a common recovery, is the very means and consideration of getting the estate resettled upon the marriage of the eldest son. By this method, the moment he attains to the age of twenty-one years, he may set his father at defiance, suffer a common recovery, and bar all the rest of the family. This consequence alone, in a case unprecedented, is a sufficient objection.

When a termor, after the 4 H. 7, made a feoffment and levied a fine with proclamations, and insisted upon five years' non-claim, the judges, with strong sense, said, though a feoffment by tenant for life, or years, or at will, is a disseisin, it shall not operate as a disseisin to enable the termor himself to bar the inheritance by a fine with proclamations according to the 4 H. 7, c. 24; for, say they, "it was never the intent of the makers of the Act that those who could not levy a fine, should, by making an estate by wrong and fraud, be enabled to bar those who had right. For if they themselves, without such fraudulent estate, could not levy a fine to bar them who had the freehold and inheritance, certainly the makers of the 4 H. 7, c. 24, did not intend that by making of an estate by fraud and practice, they should have power to bar them: and such fraudulent estate is as no estate in the judgment of the law." So say I, in the present case. It was never the intent that those who could not suffer a recovery should, by making an estate by wrong and fraud, be enabled to bar those in remainder or reversion who had right. For if they themselves, without such fraudulent estate, could not suffer a recovery to bar those in remainder and reversion, certainly the framers of this qualified species of alienation did not intend that by making an estate by fraud and practice they should have power to bar them: and

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such fraudulent estate is as no estate in the judgment of the law.

The judges then put many cases, where a recovery in dower or other real action, a remitter to a *feme covert* or an infant, a warranty, a sale in market-overt, the king's letters patent, a presentation, an administration—in short, all acts temporal and ecclesiastical—shall be avoided by covin: and from thence argue that a fine which the parties had no power to levy directly, shall not be supported indirectly by covin. So argue I, in the present case: a common recovery which the parties had no power to suffer directly, shall not be made good by wrong and fraud.

In the spirit of the makers of the 14 G. 2, I say the parties to this recovery had not the power to suffer it: therefore it is substantially bad.

This is not the case of a feoffment to a third person for his own benefit: it is, in effect, to the use of Sir Robert, the wrongdoer, himself. The law considers a feoffee to the intent to be tenant to the *præcipe* as a mere instrument for one purpose of form only. His wife shall not be endowed; his statutes or judgments shall not affect the land; if he had a term for years, it shall not merge. Let me appeal, then, to the oldest authorities, in those times when the solemnity and notoriety of feoffments, and the feudal veneration in which they were held, gave them all that wonderful efficacy we read of: could a man, by his own injurious feoffment, have acquired an advantage to himself? Littleton shall answer: he tells what was established long before he wrote. Litt. s. 395: "If a disseisor infeoff his father in fee, and the father die seised of such estate, by which the lands descend to the disseisor as son and heir, &c.: in this case the disseisee may well enter upon the disseisor, notwithstanding the descent: for that, as to the disseisin, the disseisor shall be adjudged in but as a disseisor, notwithstanding the descent; *quia particeps criminis*."

After the statute de Donis, tenant in tail in remainder, with the concurrence of the freeholder, might make a voidable alienation, by discontinuance; but he could not acquire to himself that privilege by an injurious entry and feoffment. "He in re-

mainder in tail disseises tenant for life, and makes a feoffment, and dies without issue, and the tenant for life dies; he in reversion may enter: it is no discontinuance." Co. Lit. 347 a, b. It is no disseisin of the reversion. "If remainder-man for life disseise the immediate tenant for life, after the death of the immediate tenant he is in as tenant for life." [Co. Lit. 276 a.] Neither should a reversioner, by an injurious entry upon the tenant for life, be, in respect of strangers, allowed to transmit to his heir the privilege of descent. If the reversioner disseises tenant for life, and dies seised, the descent shall not take away the entry of a stranger. Hob. 323.

From the whole we may conclude—if, before the introduction of common recoveries as a conveyance, this question had been agitated in an adversary real action, upon a plea "that Earle was not tenant of the freehold," it would have been adjudged, from the law and artificial learning of tenures, "that he could not be so considered." If the question had been, "whether tenant in tail in remainder should, by such injurious entry and feoffment, acquire a benefit to himself to the prejudice of his reversioner," it would have been adjudged, from eternal principles of justice, "that an act founded in wrong should not, by virtue of the crime itself, become legal for the author's advantage."

As it is now agitated, when common recoveries are established as a species of alienation, the only question is, "whether the rule of law which requires the concurrence of the owner of the first estate for life shall be overturned." 'Tis better to subvert the rule directly, than suffer it to be done by a secret injurious entry and feoffment; which cannot be prevented, and which the owner may never hear of.

There is no injury or wrong for which the law does not provide a remedy. But, if this stratagem should prevail, redress must follow too late: unless the entry of the tenant for life shall avoid the recovery. If it would, there is an end of the present question: for the jointress entered, and was entitled to the profits from Sir Robert Atkyns as a trespasser *ab initio*.

In every light, and upon every ground of law, this recovery is bad.

As there is no bar to the right of the lessor of the plaintiff—

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The second general question is, “Whether the lessor of the plaintiff is, by the statute of limitations, barred from recovering in this ejectment?”

This point was certainly not insisted upon at the trial, and therefore the special verdict is not adapted to it. The abstruse learning, upon which the validity of the common recovery depended, might engross the whole attention at the trial: and the special verdict, having no facts (which easily might have been found) particularly applicable to an objection from the statute of limitations, might occasion the question not having been made at the bar till the last argument. The point, however, is certainly open upon this special verdict.

An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter; therefore it is always necessary for the plaintiff to show that his lessor had a right to enter; by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years’ adverse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession.

Every plaintiff in ejectment must show a right of possession as well as of property: and therefore the defendant needs not plead the statute, as in the case of actions.

The question then is, whether it appears upon this special verdict, “that the lessor of the plaintiff might enter when he brought this ejectment.”

On the 9th November, 1711, Sir Robert Atkyns died without issue male. On the 9th October, 1712, Lady Atkyns, the jointress, died. Then accrued the title of entry of the lessor of the plaintiff. His only excuse for not entering is “that he was prevented by the said lease of the 31st May, 1698, to the three Dacres:” that upon the death of Thomas Dacres, the surviving lessee, on the 23rd July, 1752, a new title of entry accrued; upon which he entered on the 15th December, 1752, and brought this ejectment.

Three answers are given; any one of which, if well founded, is sufficient.

1st. That the said lease was absolutely void, and of no effect.

2nd. If good, it determined by the estate tail being spent, by the express tenor of the demise.

3rd. If subsisting, yet, upon the extinction of the estate tail, it was a trust to attend the inheritance in the lessor of the plaintiff, and made part of his title deeds; therefore could not stop the statute's running to protect the adverse possession, nor give him any new right of entry.

First, That the lease was void.

Sir R. Atkyns the father, being only tenant for life, could, by virtue of his ownership, make no estate to continue after his death. This lease, therefore, after his death, can only be supported by his power, if it was made pursuant to it. "Whether it was made pursuant to his power," is the question.

The limitation and modifying of estates, by virtue of powers, came from equity into the common law with the statute of uses. The intent of parties who gave the power ought to gain every construction. He to whom it is given has a right to enjoy the full exercise of it: they over whose estate it is given have a right to say "it shall not be exceeded." The conditions shall not be evaded; it shall be strictly pursued in form and substance: and all acts done under a special authority, not agreeable thereto, nor warranted thereby, must be void.

Of all kinds of powers, the most frequent is that "to make leases." For the encouragement of farmers to occupy, stock, and improve the land, it is necessary they should have some permanent interest. Unless the owner of the estate for life was enabled to make a permanent lease, he could not enjoy to the best advantage during his own time; and they who come after must suffer by the land being untenanted, out of repair, and in a bad condition. The plan of this power is for the mutual advantage of possessor and successor. The execution thereof is checked with many conditions to guard the successor, that the annual revenue shall not be diminished: nor those in succession or remainder at all prejudiced in point of remedy or other circumstance of full and ample enjoyment.

There are two methods of leasing in common use in this kingdom,—at the best rent: and upon fines, which, as the lives of leases drop, are considered among the annual profits. This power is always adapted to both. It is inserted in almost every

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strict settlement of every kind. It is inserted in the greater deed of the 12th June, 1669, and given indiscriminately to Sir Robert the father, Sir Robert the son, and Lovis his wife.

The nature and view of a power so usually given is well understood; and courts of justice have always looked with a jealous eye to see that the conditions in favour of the next taker be pursued; not literally only, but substantially. It is not sufficient that the ancient rent be reserved; it must be reserved with all the beneficial circumstances. If payable before at four, it cannot be reserved at two payments. *Mountjoy's Case*, 5 Rep. 3 b. The whole rent must be payable annually during the whole term. In that case, it was holden that less could not be reserved even to the lessor himself during his own life.

One of the reasons in *Elmer's Case*, 5 Rep. 2, shows the rent must be payable annually during the term.

In *Orby v. Mohun*, 2 Vern. 531, 542, Lord Cowper, Holt, and Trevor, all three held clearly that a lease "reserving the best rent," though good against an owner of the inheritance, was void under a power; and Cowper and Trevor held that reserving "the ancient rent," where lands had been usually demised, though good and certain enough by reference against an owner of the inheritance, was void under a power; because it put the remainder-man under difficulties in avowing. "The intent was," say they, "that the tenant for life in possession might lease: so it was, on the other hand, that the revenue should not be diminished, but the ancient rent at least reserved; and in such beneficial manner as might with certainty and without any difficulty be recovered." "The question here is not," say they, "whether the lease is void for uncertainty, as between the lessor and lessee, but whether all requisites are observed, and such beneficial clauses and reservations as ought to have been, for the benefit of a third person, the remainder-man.

In *Earl of Cardigan v. Montague*, 6th June, 1755, a decretal order on the master's report; the Duke of Montague, tenant for life, without impeachment of waste, had power to lease, reserving ancient rent where usually demised, and best rent where not usually demised; he made twenty-four leases. The master's report as to many of the leases, which he reported bad, was sub-

mitted to ; as where ancient covenants “ to grind at mills,” or “ to pay land-tax,” were not in the new lease : where some part not within the power is included in the lease : where many manors were included in the lease, reserving a sum certain as the best rent, which laid the remainder-man under difficulties to find out whether it was the best rent or not. As to five of them which the master reported to be good, exceptions were taken. Their validity turned upon this case. The words in the power were, “ reserving ancient, usual, and accustomed rents, heriots, boons, and services.” In the former leases the tenants covenanted “ to keep in repair : ” that covenant was omitted in this. The Lord Chancellor was of opinion that that covenant was a boon, and beneficial to the remainder-man ; and held these leases void for want for it. He took some days to consider ; and declared he was clear upon the argument, but took time because there was no case in point. The more he thought of it, the more he was convinced. The principle he rested upon was, that the estate must come to the remainder-man in as beneficial a manner as ancient owners held it.

I have gone so far at large into the general doctrine, not from any difficulty, but because the point is of so much consequence to the lessor of the plaintiff. For this writing of the 31st May, 1698, has not colour enough to make a question.

1st. It is no lease at all. The very definition of a lease is a contract between landlord and tenant, by which both are bound in mutual stipulations.

A sale and lease are defined to be the same species of contract. A sale cannot be, unless somebody agrees to pay the price ; nor can there be a lease, unless somebody agrees to hire and to pay the rent. This writing purports to be such a contract. It is an indenture, which implies reciprocal instruments, tallying one with the other. It professes being made by Sir Robert Atkyns on the one part, and the three Dacres on the other part. But it is not : the Dacres are not bound : they never executed this, or any counterpart. It does not appear they knew or consented to the making of it.

Livery of seisin was immaterial. A lease by virtue of a power takes effect out of the settlement that gives the power. But John Dacres, who gave the letter of attorney to take livery, died

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in 1705. Robert died in 1706. Sir Robert Atkyns the father lived till 1709. Suppose at his death 360*l.* a year a beneficial rent: those in remainder could not demand it. Thomas Dacres had not executed the lease: he had not accepted it; he never had entered under it: no distress could be taken from him; no action could be brought against him.

One man cannot oblige another to be his tenant at a high rent without his consent. This is so plain, that on the part of the plaintiff they have argued that Thomas Dacres was bound by acceptance three ways:—

1st. Because livery of seisin was taken in the name of John, Robert, and Thomas.

Answer: Thomas gave no authority so to do: it does not appear that he knew of it. But the mere taking livery of seisin, if he never entered or occupied, would not be sufficient to charge him with the rent reserved.

2nd. In the ejectment brought in Hilary Term, 1711, a demise was laid from Thomas Dacres, as well as the jointress, and the plaintiff had judgment to recover “*separales terminos.*”

Answer: The two titles are inconsistent; so there could not be really a recovery upon both. But the judgment pursued the declaration and was mere form. It does not appear that Thomas Dacres knew his name was made use of; and he never entered or took possession.

3rd. That acceptance shall be presumed. And it is compared to grants; and *Thompson v. Leach* is cited. (3 Lev. 284.)

Answer: The ground of *Thompson v. Leach*, and of all the cases there put, is “that a gift imports a benefit; and consent to receive a bounty may fairly be presumed till the contrary appear.” But the offer of lands to a substantial man at a rack-rent does not import such benefit as nobody in his senses could refuse. And here there is no room to presume, for the contrary appears. Thomas Dacres dissented during his whole life, and never took possession. The contrary appears, too, from the writing itself. It never was the intent that the Dacres should take possession or pay rent. It was to be a conveyance only of the ideal freehold, which might nonsuit the remainderman in case he brought an ejectment against third persons; or prevent

his suffering a recovery ; but never could be any security to him for his rent.

It is immaterial whether an owner of the inheritance could convey an ideal freehold, to delay the tenant in tail claiming under his grant from suffering a recovery. The question here is, whether it be that usual husbandry lease, reserving a rack rent, which is intended by every power of leasing.

It is very clear that none of the lessees were bound by this writing ; more especially that Thomas Dacres was not. But I go further : Sir Robert Atkyns, the nominal lessor, was not bound by it. The deed was never out of his own possession. The declared intent proves it a trust for Sir Robert himself. His will, under which the lessor of the plaintiff claims, avers it to be a trust, and devises it as such.

It is no objection to a lease under a power, “ that it is in trust for him who executes the power : ” provided the legal tenant be bound during the term in all requisite covenants and conditions. But here at the death of Sir Robert the father, those in remainder had no tenant to resort to : and the nominal tenant never did in fact enter, nor could either in law or equity ever have been compelled to enter or pay one farthing rent. So that this writing, calling itself an indenture, and purporting to be a contract, is waste paper only, by which nobody ever was bound.

But suppose it had been executed by the three Dacres, it could not be supported as a lease within the meaning of the power ; upon a variety of plain objections, in respect of the premises, the rent, and the remedy.

1st. As to the premises demised :—It comprises too much, and lays the remainder-man under difficulties to know whether the best rent is reserved. It extends to things out of which no rent can be reserved—as tithes, rents of assize, rents of customary tenants, commons, feedings, and lands in the several tenures of particular persons. The condition of the power is, that there should be no term exceeding three lives in being at the same time ; yet the demise extends to all and every the rents reserved upon any leases or grants.

2ndly. As to the rent reserved :—The power requires “ the best rent that can be reasonably got, to be reserved, payable during the term.” There is no covenant for payment. Under a

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mere reservation it could not be payable until entry; and therefore, in fact, might never be payable during the term. It is not found "to be the best rent."

3rdly. As to the remedy:—There being no covenant to pay the rent, the lease might be assigned to a succession of beggars. There being no clause of re-entry, the ground might lie unoccupied without any or not sufficient distress upon it: so that the remainder-man could neither have his rent nor his land. There is no counterpart; an unusual omission, and very prejudicial.

Therefore the lease could not have been supported, if it had been executed by the three Dacres, which is not the case.

Every fraudulent, unfair, prejudicial execution of such a power, in respect of those in remainder, is void at law.

If the lease be a void execution of the power against all claiming under the settlement, it cannot be made good against the reversion in fee, whereof Sir Robert the father was seised, either by virtue of the livery, or by way of estoppel, supposing the three Dacres to have executed; because an interest would have passed during the life of Sir Robert the father; and there is no estoppel where any interest passes; and to make it operate by virtue of the livery, out of the reversion in fee, would be contrary to the whole intent of the deed plainly expressed. Which brings me to a second answer given.

2nd answer. Suppose this pocket undelivered grant of the ideal incorporeal freehold a good execution of the power: they have argued that it determined with the estate tail; that the only cause of the grant being "to preserve the reversion during the estate tail" must qualify the grant, and amount to a limitation; that there is no technical form of words necessary to express a contingency, upon which an estate for lives may sooner determine.

The deed might have said expressly, "if the heirs male of Sir Robert Atkyns the son continue so long;" or, "that the lease should determine, if, during the lives, the estate tail should be spent." That the intent of the deed, plainly expressed, is tantamount.

3rd answer. Suppose it to subsist: it is as a trust, and devised

as such, to attend the inheritance of the lessor of the plaintiff, which came into possession the 9th October, 1712; his title and right of entry then accrued.

This lease was one of his muniments; a mere weapon in his hands; and it would be going a great way to say "such a form should take from an adverse possession the benefit of the statute."

But, as we are all clear "that at the trial a surrender of such a lease might, and ought to be presumed, to let in the statute of limitations," the special verdict here not having found such surrender, we cannot come at the justice of the case in that shape.

It is unnecessary to go into this point, or the former; and it would be very improper unnecessarily to do it.

If the Dacres had no estate by virtue of this demise upon the 9th October, 1712, then this ejectment was not brought within twenty years after the lessor's title accrued; and no facts are found to excuse him within any of the exceptions.

Therefore we are all of opinion that there should
be judgment for the defendants.

A writ of error was brought in the House of Lords, and came on upon Thursday, 26th January, 1758. The counsel agreed, and were allowed, to argue the last point for the judgment of the House first: because if their lordships should be of the same opinion with the Court of King's Bench, "that this ejectment was barred by the statute of limitations," it would be quite unnecessary to go into the first question.

All the judges were ordered to attend; to whom, after the argument at the bar was over, the House proposed the following question; *viz.*:—

"Whether sufficient appears by the special verdict in this cause to prevent the lessor of the plaintiff, by force of the statute of limitations of the 21st of King James the First, from recovering in this ejectment?"

Whereupon the Lord Chief Justice WILLES, having conferred with the rest of the judges, delivered their unanimous answer: "That sufficient does appear by the special verdict in this cause, to prevent the lessor of the plaintiff, by force of the statute of

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limitations, of the 21st of King James the First, from recovery in this ejectment."

Then the judgment of the Court of King's Bench was affirmed, with 5*l.* costs.

Presumption
as to death ;

as to sur-
vivorship.

In *Nepean v. Doe*, ante, p. 542, it was held that where a person goes abroad, and is not heard of for seven years, the law presumes that he is dead, but there is no *presumption of law* as to the precise time of the death. In like manner, there is not, by the law of England, any *presumption of law*, arising from difference of age and sex, as to survivorship where the death of several persons is occasioned by the same cause ; nor is there any presumption of law that all died at the same time. The question is one of fact depending entirely on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined ; the *onus probandi* being upon the person setting up a survivorship. These rules were laid down by the House of Lords in *Wing v. Angrave*, 8 H. L. C. 183, a case in which a husband, and wife, and two children, had been swept away in a shipwreck by the same wave. See also *Re Phené's Trusts*, 5 Ch. 139 ; *Wollaston v. Berkeley*, 2 Ch. D. 213 ; *Prudential Assurance Co. v. Edmonds*, 2 App. Cas. 487 ; *Rhodes v. Rhodes*, 36 Ch. D. 586 ; *Re Alston*, (1892) P. 142. In *Hickman v. Upsall*, 20 Eq. 136, 4 Ch. D. 144, a tenant for life, who had been receiving periodical payments from a mortgagee in possession, left her home on 25th March, 1866, and was never heard of again, and it was held that *seven years after that time* the proper inference was that she died about June, 1866, the first period when she failed to apply for any such payment.

Difficulty of
ascertaining
what was
adverse pos-
session arose
subsequently
to 12 Car. 2,
c. 24.

The doctrine of *adverse possession*, until very lately, constituted, and perhaps still constitutes, one of the least settled although most important heads of English law. The difficulties which surrounded it seem to have had an origin subsequent to the abolition of a great proportion of the ancient tenures by 12 Car. 2, c. 24. Before that event, the difference seems to have been well understood between the sort of wrongful holding which would reduce the interest of the lawful owner to a right capable of being barred by the

Statute of Limitations, and substitute the wrong-doer for him meanwhile, as the representative of the freehold and the person responsible to the lord for feudal dues and services, and that species of unwarrantable possession which was accompanied by no such consequences. At all events, it is not till a comparatively modern period that we find any complaints about the difficulty of ascertaining what did or what did not constitute *adverse possession*.

At last, however, this difficulty not only arose, but became so considerable, that in *Taylor v. Horde*, so long the leading case upon this subject, we find Lord Mansfield saying (*ante*, p. 612), that "the precise definition of what constituted a *disseisin* which made the disseisor the tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was once well known, but is not now to be found. The more we read, . . . the more we shall be confounded." The view taken by his lordship in that case (p. 610) is that *disseisin* at the common law signified some mode or other of "turning the tenant out of his tenure, and *usurping* his place and feudal relation;" an act which was also accompanied by this consequence, namely, that, if the disseisor died seised, the descent to his heir gave *him* the right of possession, and tolled or took away the true owner's entry. Co. Litt. 238 a; Litt. s. 426.

Lord Mansfield's opinion as to what was originally a *disseisin*.

This being the state of things at common law, the *assize of novel disseisin* was invented; which being found a beneficial remedy, but being applicable only to the case of a person *disseised*, a fiction grew up and was encouraged by the courts, according to which a party wrongfully out of possession, although not *disseised*, properly speaking, of the freehold, was permitted to treat the wrong done him as a *disseisin* for the sake of entitling himself to an assize. "In a word," says Lord Mansfield (p. 613), "*for the sake of the remedy, as between the true owner and the wrong-doer to punish the wrong, and as between the true owner and naked possessor to try the title*, the assize was extended to almost every case of obstruction to an owner's full enjoyment of lands, tenements, and hereditaments."

Introduction and extension of assize of novel disseisin.

This sort of supposed *disseisin* obtained the name of *disseisin at election*, for the purpose of distinguishing it from the other, or *actual disseisin*, the consequences of which were widely different.

Disseisin at election.

For, after an *actual disseisin*, the disseisee could not devise or dispose of the lands, inasmuch as his interest was,

Effect of actual disseisin.

by the disseisin, cut down to a right of entry which the policy of the old law against maintenance would not allow him to depart with; and, further, if a descent was cast, after a year he lost his right of entry, and was put to his real action in order to reinstate himself.

Disseisee's condition made worse by 21 Jac. 1, c. 16;

When St. 21 Jac. 1, c. 16, s. 1, (repealed, Stat. Law Rev. Act, 1863), had passed, his condition became still worse, for, by that Act it was ordered that no person shall make any entry into any lands, tenements, or hereditaments, but within twenty years next after his "right or title which shall hereafter *first* descend or accrue to the same," except infants, femmes coverts, persons *non compotes mentis*, imprisoned, or beyond the seas, who shall have ten years next after their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, to make their entry or claim in.

whereby disseisee's entry barred in 20 years, and right owner put to real action.

Previous to this, the claimant might have entered at any time, provided that his entry was not *tolled*; *Bevil's Case*, 4 Co. 11 b. But this Act, in twenty years, barred the disseisee's entry in the same way that a descent cast barred it at the common law; and the right owner was, after that time, put to his real action, the period for commencing which had been before limited by St. 32 Hen. 8, c. 2, and was, in the extreme case—that, namely, of a writ of right on the demandant's ancestor's own seisin—terminated at the expiration of sixty years from the time when the right first accrued which the writ was sued forth to recover.

Real action barred in 60 years.

21 Jac. 1, c. 16, did not run against disseisee at election.

However, it is apprehended that the Act of James only ran against the true owner in those cases in which he would, at common law, have been put out of his tenancy and reduced to his right of entry; but not in cases in which he might have *elected* to consider himself disseised, although not really so, for the purpose of entitling himself to maintain an assize; and, consequently, whenever the question arose whether a particular claimant was barred by having been twenty years out of possession, the mode of solving this question was by considering whether he had been out of possession under such circumstances as had reduced his interest to a *right of entry*; for, if he had, then, as that right of entry would be barred by St. 21 Jac. 1 at the end of twenty years, the possession during the intermediate time was *adverse* to him.

Question was whether right-ful owner's interest reduced to right of entry.

This depended on manner in which person

Now, in order to determine whether the claimant had been out of possession under circumstances which would

turn his estate to a right of entry, it was necessary to inquire in what manner the person who had been in the possession during the time held. See *Reading v. Royston*, 2 Salk. 423. If he held in a character incompatible with the idea that the freehold remained vested in the claimant, then, as the case would arrange itself under some one of the heads *disseisin*, *abatement*, *discontinuance*, *deforcement*, or *intrusion*—all of which expressed at common law different modes of substituting a freeholder by wrong for one by right, so as to make the new comer tenant to the lord and to a stranger's *præcipe* (see 1 Roll. Abr. 659; Co. Litt. 277; and the note, *ante*, p. 617), it followed that the possession in such character was *adverse*. But it was otherwise if he held in a character compatible with the claimant's title. And, in order to ascertain in what character the person in possession held, the court would look at his conduct while in possession. See *Doe v. Grubb*, 10 B. & C. 816; *Smartle v. Williams*, 1 Salk. 245; *William v. Thomas*, 12 East, 141; *Doe v. Perkins*, 3 M. & S. 271; *Hall v. Doe*, 5 B. & Ald. 687; *Doe v. Scott*, 4 B. & C. 706; *Doe v. Pettett*, 5 B. & Ald. 223; and *R. v. Axbridge*, 2 A. & E. 520.

It is therefore apprehended that at the time of the enactment of 3 & 4 Wm. 4, c. 27, the question whether possession was or was not *adverse* was to be decided by inquiry whether the circumstances of that possession were sufficient to evince its incompatibility with a freehold in the claimant.

It is not intended to carry the discussion of this part of the subject much further, since the above Act, as will be shown, has rendered the doctrine of *adverse possession* of less importance, so far as claims of title founded upon twenty years' enjoyment are concerned. See, as to the application of the old doctrine of adverse possession, *Doe v. Millett*, 11 Q. B. 1036.

Doctrine of adverse possession of less importance since 3 & 4 Wm. 4, c. 27.

A title might, however, after this Act depend upon a fine, and five years' non-claim prior to the Act, and to 3 & 4 Wm. 4, c. 74, which abolished fines and recoveries. For instance, supposing an ejectment to be brought against A. for lands of which he had been in possession nineteen years, and of which he had levied a fine before 3 & 4 Wm. 4, c. 74. In such a case, not having been in possession twenty years, he could, of course, have no defence under 3 & 4 Wm. 4, c. 27. His defence, if any, would rest upon the operation of the fine. But, in order that the fine might operate for

Might since that Act be material as to operation of a fine.

his advantage, it would be essential that there should have been an adverse possession at, and for five years after, the time of levying it. *Doe v. Perkins*, 3 M. & S. 271; *Hall v. Doe*, 5 B. & Ald. 687; see 1 Prest. Conv. 224, 310. So that the question of adverse possession or not might still become material, with a view to determining the operation of a fine, and, though it is difficult to suppose the case arising at the present day, it has been thought well to retain this portion of the note.

Primâ facie
adversepossession same in
case of fine as
for barring
right of entry.

Now, *primâ facie*, there certainly does not seem to be any reason why the adverse possession necessary to make a fine with proclamations operate by way of bar should be in any respect different from the adverse possession necessary (before 3 & 4 Wm. 4, c. 27) for the purpose of barring a right of entry. It is true that the *effect* of the fine was more extensive than that of the statute of Jac. 1; since the one barred the true owner's *right*, the other only his remedy by way of entry. But, though their operations (where they did operate) were different, I cannot help thinking that the adverse possession necessary to enable either to operate at all must have been the same; for in both cases it seems to have been necessary that the claimant's estate should have been divested, before either the twenty years or the five years would begin to run.

Contra, Doe v. Gregory.

It would, therefore, have been submitted pretty confidently that the same species of adverse possession would have sufficed for both purposes, were it not for *Doe v. Gregory*, 2 A. & E. 14, where the contrary seems to have been the opinion of the Court of Q. B. In that case, Rogers, being seised in fee, devised to his son Thomas for life, remainder to William, in tail male, remainder to his own right heirs. After his death, Thomas, the first tenant for life, (having a power to jointure in that manner), settled the lands upon his wife for life and died. His wife survived him and married Vale, who, along with her, levied a fine of them. She died, and twenty years elapsed; after which (Vale having died in 1832, and William's issue having failed) the heir of Rogers, the devisor, brought an ejectment. The court held that he was barred, saying that "in *Doe v. Perkins*, 3 M. & S. 271," (which, by the by, has been much questioned; see *note*, 1 Wms. Saund. 319 d; also *Watk. Conv.*, by Morley and Coote, p. 26), "the court was of opinion that a fine, levied by a person who was in possession under the same circumstances as the defendant" (this

should be "Vale") "here, operated nothing, because he came in by title, and had no freehold by disseisin; and it was argued that the defendant here was also to be considered as having entered rightfully, and committed no disseisin. *We are, however, of opinion, that, though this may be so for the purpose of avoiding a fine, it cannot prevent the defendant's possession from being wrongful from the very hour when his interest expired by his wife's death. It is clear that he might have been turned out by an ejectment. We think, therefore, that his continuing the same possession for twenty years entitles him to the protection of the Statute of Limitations, and that this action has been brought too late.*"

It would perhaps be difficult to support the above distinction upon principle, since, on the one hand, it was well settled that a fine with proclamations would operate as a bar if levied by a person having acquired a tortious freehold; and, on the other hand, it is impossible to conceive how the Statute of Limitations could have begun to run until such a freehold had been acquired by some person; since, as that statute only forbade the assertion of a right of entry after the lapse of twenty years, it never could begin to run against any person who had not previously been put to his right of entry, which could not be the case until some one had acquired an adverse freehold, inasmuch as the person in actual enjoyment must have been in of an estate either consistent or inconsistent with that of the true owner; now, if it were *consistent*, the possession of the occupier would be *his* possession, and he would not be put to his right of entry, nor could the statute begin to run against him; if *inconsistent*, then it must have been a tortious freehold, since a wrong-doer could not possibly have acquired a less estate; and in that case, a fine with proclamations duly levied would have operated.

Discussion
of *Doe v.*
Gregory.

It may be stated that *Doe v. Gregory* is itself an instance of a case in which stat. 21 Jac. 1 ran, although stat. 4 Hen. 7, c. 24 (of Fines), would not have done so. But, with submission, it may be suggested that, though the fine in *Doe v. Gregory* was manifestly inoperative, yet it might be open to some doubt whether stat. 21 Jac. 1 ought to have been held a bar, since Vale, having come in rightfully upon his marriage, was on his wife's death in the situation of a person who had come in by right and held over without right, which is the very definition of a tenant by sufferance; see Com. Dig., *Estate*, 1; Co. Litt. 57 b, *ubi*, "tenant pur

Discussion
of *Doe v.*
Gregory.

terme d'auter vie continueth in possession after the decease of ce' que vie, the lessor cannot have an action of trespass before entry."

It is true that, as the court remarked in *Doe v. Gregory*, Vale might have been immediately turned out by an ejectment: but that might be, not because his possession was adverse, but because a tenancy at sufferance would constitute no defence in that action. In the place above adverted to, Lord Coke proceeds: "Now that a writ of entry *ad terminum qui præteriit* lyeth against such a tenant as holdeth over,—is rather by admission of the demandant, than for any estate of freehold that is in him, for in judgment of law he hath but a bare possession." And Lord Hale adds in a note: "Tenant for years surrenders and still continues possession; he is tenant at sufferance or disseisor at election." Now, it is apprehended that the possession of a tenant by sufferance never could be adverse, and that, indeed, it was for the very purpose of preventing the true owner's entry from being taken away, that the law originally raised such tenancies; see Co. Litt. 57 b; 1 Roll. Abr. 659; *per* Abbott, C.J., *Doe v. Hull*, 2 D. & R. 38; and the note by Morley and Coote, Watk. on Conv. (6th ed.) p. 24, where this subject is very ably handled.

It is not, however, necessary to impugn the decision in *Doe v. Gregory*, since Lord Coke proceeds, *ubi supra*: "There is a diversity between particular estates created by the tenant, and particular estates created by act in law: as, if a guardian after the full age of heir continueth in possession, he is no tenant at sufferance, but an abator against whom an assize of mort d'ancestor doth lie; *et sic de similibus*;" and Lord Hale adds: "If guardian in such case die seised, the entry of the heir tolls." So that, on this distinction it may be argued that, the wife's estate, in *Doe v. Gregory*, having been cast upon the husband Vale by act of law, his continuance in possession was not as tenant at sufferance, but as an intruder against the remainderman, in which case he would have acquired a tortious freehold, and the 21 Jac. 1 would clearly run. But, with submission, so would the statute of non-claim (4 Hen. 7, c. 24) have run too, had the fine been one capable of operating. It, however, was not so, but at the time when it was levied, namely, during the wife's life, was beyond dispute void. So that the arguments above hazarded are directed, not against the decision in *Doe v. Gregory*,

but against the *dictum*, which was not essential to the decision of the case, that a possession might be adverse within 21 Jac. 1, and yet not adverse for the purpose of the statute of non-claim.

The above remarks are hazarded with much diffidence, as well on account of the high authority of the *dictum* in *Doe v. Gregory*, as also because an opinion certainly has been entertained by persons of learning that there might be a possession adverse under 21 Jac. 1, yet not amounting to the seisin of a freehold by wrong. This opinion receives countenance, too, from part of the elaborate judgment of Lord Mansfield in *Taylor v. Horde*. But I confess it seems to me impossible to understand how the possession of land could be otherwise than either *consistent* with the rightful claimant's freehold, in which case it could not be adverse to it—or *inconsistent* with it, in which case it must have become so by reason of the acquisition of a tortious fee, since no wrong-doer could acquire a less estate, inasmuch as, to use the expression of Lord Hobart, Hob. 323, "Wrong is unlimited, and ravens all that can be gotten."

Can there be possession adverse under 21 Jac. 1, yet not seisin of freehold by wrong?

In a case in the Irish Court of C. P., *Eyre v. Walsh*, 10 Ir. C. L. R. 346, a somewhat similar question to that in *Doe v. Gregory* was raised. The court stated that a new trial ought to be granted, in order that the question might be left to the jury whether the possession was by permission of the remainderman, or adverse thereto, and that, should neither party give any further evidence on the point, it would be necessary to decide whether the case was governed by *Doe v. Gregory* or by *Doe v. Hall*.

Eyre v. Walsh.

These observations on the old doctrine of *adverse possession* seem best concluded by the remark that, should a question be ever again raised as to the species of possession necessary for the purpose of rendering a fine with proclamations operative, such questions will be more easily answered after consulting *Davies v. Lowndes*, 5 B. N. C. 161, 172, where the doctrine is thus stated to the grand assize by Tindal, C.J.:

Doctrine of adverse possession explained in *Davies v. Lowndes*, by Tindal, C.J.

"I was about to tell you what the condition of a party who levies a fine should be, in order to give it effect or validity. Your tenant can never levy a fine so as to injure you the landlord; and if a party receives possession of an estate through another for a term of years, a fine levied by such a person would be merely void. A fine levied by a stranger to the estate, who had nothing to do with it, would be

merely void. It would be a singular thing if any body of laws would allow such a proceeding as that two persons, by collusion between themselves, might go through a process in a court of justice which would deprive the possessor of his rights to the estate. It is necessary, therefore, in order that a fine may have its validity, that the person who levies the fine should have a freehold estate, either by right or by wrong. If he turns out a lawful possessor of it, if he has committed a disseisin, he has what is called a wrongful freehold; and, if the party entitled has not claimed within five years after the fine has been levied, that would be a bar to him. Or if a person has been in by right adversely to the rest of the world, and asserting the dominion to be his own, and levies a fine: after the proclamations have been made and five years have expired, any dormant or latent claim would be equally barred: and therefore the question for you to determine will be, whether Mr. Selby, at the time when the fine was levied in Trinity Term, 1784, was in possession of this estate to which the fine relates, having entered upon it, and claiming it, and exercising the right to it, as his own. If he was so, he had such an estate as would make the fine levied by him a fine available at law." See *Doe v. Pett*, 11 A. & E. 842; *Davies v. Lowndes*, 7 Scott, N. R. 141.

3 & 4 Wm. 4,
c. 27.

37 & 38 Vict.
c. 57.

We now come to the Real Property Limitation Act, 1833, but, before treating of it in detail, it should be mentioned that by the Real Property Limitation Act, 1874, which came into force on the 1st Jan. 1879, some changes are introduced which affect, principally, the periods of limitation established by the Act of 1833; the periods of twelve, six, and thirty years being substituted for those of twenty, ten, and forty in the Act of 1833, in accordance with the view suggested by the Real Property Commissioners in their first Report (pp. 42, 43), that "as knowledge is diffused, and the administration of justice becomes regular and pure, the periods of limitation may be safely abridged." See Charley's Real Property Acts, where will be found an interesting discussion of the new Act, founded upon the speeches of Lord Cairns and Lord Selborne at the time when the bill was in Parliament.

3 & 4 Wm. 4,
c. 27, does
away with
non-adverse
possession.

"The second and third sections of 3 & 4 Wm. 4, c. 27," to use the language of the court in *Nepean v. Doe*, "have done away with the doctrine of non-adverse possession, and, except in cases falling within the fifteenth section of the

Act, the question is, whether twenty years *have elapsed since the right accrued.*"

The sections in question are as follows: (S. 2.)—"After the 31st day of December, 1833, no person shall make an entry or distress or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

S.2 established limitation of 20 years from accrual of right:

By the Act of 1874, s. 9, this section is repealed from the 1st Jan., 1879, and by s. 1 of the latter Act it is re-enacted, the word "twelve" being substituted for "twenty," and the words "or suit" added after "action." By s. 100 of the Judicature Act, 1873, and R. S. C., O. I., r. 1, all civil proceedings in the High Court are to be termed "actions."

Reduced to 12 years by 37 & 38 Vict. c. 57.

In *Marshall v. Smith*, 34 L. J. Ch. 189, a widow's right to sue in equity for dower was held by Stuart, V.-C., to be barred where she had not for thirty years taken any proceedings to have it assigned to her; and he expressed an opinion that s. 2 of the Act of 1833 extends to an action for dower.

Dower barred by 3 & 4 Wm. 4, c. 27.

Where the lord had seized copyholds *quousque*, it was held that the Act applies to bar a suit by the heir of the former tenant to compel admittance; *Walters v. Webb*, 5 Ch. 531. And it applies to bar the right of the lord of a manor to enter and seize *quousque*, which first accrues when the tenant refuses to come in and be admitted after proclamations or notice; *Ecclesiastical Commissioners v. Parr*, (1894) 2 Q. B. 420.

Right to copyholds seized *quousque*;

or to enter *quousque*.

The time of limitation having been thus directed to run *from the time at which the right first accrued*, the mode in which that time is to be ascertained is pointed out by the third section, which enacts,—“In the construction of this Act, the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say;)

How time from which right accrues is to be ascertained.

S. 3.

“When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in

(1) In the case of claimant dispossessed:

receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt; then such right shall be deemed to have first accrued *at the time of such dispossession, or discontinuance of possession, or at the last time at which any such profits or rent were or was so received*:

(2) Of claimant of estate of person who died in possession :

“ And when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt; then such right shall be deemed to have first accrued *at the time of such death* :

(3) Of claimant under assurance, other than will by person in possession :

“ And when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt; then such right shall be deemed to have first accrued *at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument* :

(4) Of claimant of future estates :

“ And when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent, in respect of such estate or interest; then such right shall be deemed to have first accrued *at the time at which such estate or interest became an estate or interest in possession* :

(5) Of forfeiture.

“ And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued *when such forfeiture was incurred, or such condition was broken*.”

The 4th branch of this section, which deals with future estates, must be read with reference to s. 2 of the Act of 1874; see *post*, p. 654.

Question

Now, with regard to s. 3 of the Act of 1833, I will here

remark that, according to the doctrine of the Court of C. P., in *James v. Salter*, 3 B. N. C. 544 (approved by the C. A. in *Magdalen Hospital v. Knotts*, 8 Ch. D. 727), it is not intended to comprise all cases falling within the operation of s. 2, but only to give examples of the *modus operandi* of s. 2 upon certain cases. See also *per* Lord Cairns, in *Pugh v. Heath*, 7 App. Cas. 235, 238. This doctrine of the Court of C. P. is contrary to the impression which had been entertained upon the subject by Sir E. Sugden, V. & P., 11th ed., 618; the case of *James v. Salter* will, however, be discussed at greater length towards the conclusion of the note. Perhaps it may turn out that, practically speaking, there is no great difference between the construction adopted by the court and that suggested by Sir E. S., since the opinion of the latter seems to be, that every case is included within the terms of s. 3; of the former, that though some cases are not specifically included within the terms of s. 3, still, that the application of s. 2 to them is to be regulated by a regard and in analogy to the instances given in s. 3.

whether s. 3
comprises all
cases in s. 2,
or only gives
examples.

At any rate,
s. 2 governed
by analogy to
s. 3.

In *Owen v. De Beauvoir*, 16 M. & W. 547, 563, more fully set out, *post*, p. 699, Parke, B., in delivering the judgment of the Court of Exch., says on this subject: "In s. 3 the legislature, apparently considering that difficulties might exist as to the exact point of time whence the twenty years should begin to date, has proceeded to fix that point in many, if not in all, possible cases." And see *Jones v. Jones*, 16 M. & W. 699, where an ingenious but unsuccessful attempt was made to incorporate ss. 2 and 3 so as to read them together as one section, for the purposes of pleading.

Not to be read
as one section.

It seems clear that these sections do not apply to cases of mere want of actual possession by the claimant, but to cases where he has been out of, and another in, possession for the prescribed time. "There must be both absence of possession by the person who has the right, and actual possession by another, whether averse or not, to be protected; to bring the case within the statute;" *Smith v. Lloyd*, 9 Exch. 562, 572; *Agency Co. v. Short*, 13 App. Cas. 793; see *Willis v. Howe*, (1893) 2 Ch. 545. Therefore, where the owner in fee of land with minerals under it conveyed the surface, reserving the minerals with the right of entry to get them, and afterwards granted the minerals with the right of entry to a third person, it was held that the mere non-user for more than forty years did not bar the grantee's right of entry to get the minerals, no other person having worked

There must be
actual possession
by
another than
the rightful
owner.

or been in possession of them during that period; *Smith v. Lloyd, supra*. And "where one person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place;" *Agency Co. v. Short, supra*. See also *Keyse v. Powell*, 2 E. & B. 132; *Tottenham v. Byrne*, 12 Ir. C. L. R. 376; *Poole v. Griffith*, 15 Id. 239; *Dartmouth v. Spittle*, 24 L. T. 67.

Dispossession,
and discontinuance of
possession.

Dispossession is where a person comes in and drives out another from possession; discontinuance of possession is where the person in possession goes out and is followed into possession by another; *Rains v. Buxton*, 14 Ch. D. 537, 539, *per Fry, J.* As to discontinuance of the receipt of the rents or profits, see *Adnam v. Sandwich*, 2 Q. B. D. 485.

Possession of
agent is
possession of
principal.

Possession may be sufficiently taken or retained by an agent; and, where the principal has received the rents of land through an agent for the statutory period, he can acquire a title under the statute, though the agent is himself the true owner; *Williams v. Pott*, 12 Eq. 149; *Smith v. Bennett*, 30 L. T. 100. Where a person is shown to have been in possession, or in receipt of the rents, as agent, he is presumed to continue to do so until something has been done to change the character of his possession; *Pelley v. Bascombe*, 33 L. J. Ch. 100; *Smith v. Bennett, supra*; *Hobbs v. Wade*, 36 Ch. D. 553; *Lyell v. Kennedy*, 14 App. Cas. 437. The possession of a solicitor who, after paying off his client's debt, holds possession of the mortgaged property is the possession of his client; *Ward v. Carttar*, 1 Eq. 29; and the receipt of rents by an agent, after the death of his principal intestate, is the possession of the heir; *Lyell v. Kennedy, supra*.

Possession by
guardian.

The possession of a guardian is the possession of the infant who is his ward; and, if the guardian retains possession after the infant has attained full age, he is presumed to retain possession as guardian until something has been done to alter the character of his possession; *Pelley v. Bascombe*, 33 L. J. Ch. 100; *Thomas v. Thomas*, 2 K. & J. 79; *Hobbs v. Wade*, 36 Ch. D. 553; *Tinker v. Rodwell*, 69 L. T. 591. In *Thomas v. Thomas, supra*, Wood, V.-C., held that an entry by a father upon the estate of his infant child was an entry as his natural guardian. In *Pelley v. Bas-*

combe, supra, Stuart, V.-C., applied the same principle to a case where the brother and executor of a person, who died intestate as to realty, leaving an infant daughter, entered and took possession of the realty, and applied the rents to keeping down the interest on a mortgage. In *Hobbs v. Wade, supra*, a father took possession of the estate of his infant son, and continued in possession for more than twelve years after his son attained full age; North, J., held that the son was not barred by the statute; and in *Tinker v. Rodwell*, 69 L. T. 591, the decision of Romer, J., upon similar facts, was the same. See also *Wall v. Stanwick*, 34 Ch. D. 763.

In *Morgan v. Morgan*, 1 Atk. 489, Lord Hardwicke said: "Where any person, whether a father or a stranger, enters upon the estate of an infant, and continues in possession, this court will consider such person entering as a guardian to the infant, and will decree an account against him, and will carry on such account after the infancy is determined." This view was adopted by Jessel, M.R., in *Howard v. Shrewsbury*, 17 Eq. 378, 401, where he says: "The result, therefore, is, adopting the language of Lord Hardwicke, that an infant is entitled to treat a stranger, who takes possession of his estate, as his bailiff or agent, to get, if he likes, from him an account of the rents and profits, and a decree for possession." If this proposition is to be accepted to its full extent, it is difficult to see how the statute can bar the right of any person whose right of entry has accrued while he was an infant, unless, after he has attained full age, something has been done to change the character of the possession of the person in possession, after the infancy has terminated. Further, it would seem that the full period of twelve years must run from the time of such change.

Possession
of person
entering on
estate of
infant.
Equitable
doctrine.

Quære, as to
extent of
this doctrine.

S. 10 of the Act of 1833 provides that "no person shall be deemed to have been in possession of any land within the meaning of this Act *merely* by reason of having made an entry thereon." This section "evidently applies to a mere entry, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night time and pronouncing a few words, without any attempt or intention or wish to take possession;" *Randall v. Stevens*, 2 E. & B. 652; but it does not apply to an effective entry made *animo possidendi*; *Solling v. Broughton*, (1893) A. C. 556.

Mere entry.
S. 10.

S. 2 retro-
spective.

The general enactment of s. 2 of the Act of 1833 being as above, the reader will observe that, with some exceptions which will be hereafter noticed, and except in cases provided for by ss. 15 and 38, it is retrospective.

But by s. 15
non-adverse
possession
extended for
five years
from date
of Act.

S. 15 enacts that "when no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, *shall not at the time of the passing of this Act have been adverse* to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time *within five years* next after the passing of this Act." (As to acknowledgments, see *post*, p. 690.)

S. 38 saved
rights for
periods in
which real
action might
have been
brought.

S. 38 enacted that "when on the said 1st day of June, 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid" (referring to the abolished actions) "in respect of such land, such writ or action may be brought after the said 1st day of June, 1835, but only within the period during which, by virtue of the provisions of this Act, an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away;" (repealed, 37 & 38 Vict. c. 35).

Cases on s. 15.

On the construction of s. 15, which has, however, now, in consequence of the lapse of the five years, become of comparatively slight importance, the reader may consult *Doe v. Williams*, 5 A. & E. 291; *Doe v. Thompson*, Id. 532; *Culley v. Doe*, 11 Id. 1008; *Doe v. Angell*, 9 Q. B. 258, 328; *Incorporated Society v. Richards*, 1 Dru. & War. 289; *Shannon v. Hodder*, 2 Ir. L. R. 223; *O'Sullivan v. M'Sweeny*, Id. 89. See also *Hodgson v. Hooper*, 29 L. J. Q. B. 222, where a question arose under this section.

Except where this section or some one of the other exceptions hereinafter mentioned applies, s. 2 is decided by *Nepean v. Doe* to be, and is, indeed, clearly in its terms *retrospective*.

Unsuccessful
attempt to
extend retro-
spective
operation
of s. 2.

It was attempted in one case to stretch this retrospective operation further than either reason or convenience would have warranted. In *Doe v. Thompson*, 6 A. & E. 721, J. T., in 1807, became tenant at will to W. T., who was

seised in fee; he remained in possession till 1831 (previous to the passing of 3 & 4 Wm. 4, c. 27), when he died; and his widow had ever since continued in possession. The action was brought by the heir-at-law of J. T., who contended that, by the retrospective operation of the statute and the possession of J. T. for twenty years, a title had accrued to himself. The court, however, held otherwise. "The Act," said Littledale, J., "in the clauses referred to must contemplate cases where the possession has continued; otherwise a party might go back to an unlimited period of time for the possession on which his claim was to be founded."—"The case," said Patteson, J., "would have been quite different if the tenant at will had continued in possession. But here, after the possession had been long determined, it is contended that a fee simple arises by the passing of the Act: that cannot be."

Case of heir-at-law.

Having said thus much as to the general effect of ss. 2 and 3 of the Act, the former of which establishes the limitation of twenty (now twelve) years from the accrual of the right, while the latter points out from what time the right shall be said to accrue in the several classes of cases there provided for, let us proceed to consider the effect of the Act on persons occupying certain particular characters,—those, namely, of heir-at-law, devisee, executor or administrator, reversioner or remainderman, issue in tail, landlord or tenant, mortgagor or mortgagee, trustee or *cestui que trust*.

Heir-at-Law.

With regard to the *Heir-at-Law*, it is clear that (supposing his ancestor to have died in possession of the land or profits) he will be barred if he allow twelve years to pass without acknowledgment; the words of the 2nd branch of s. 3 of the Act of 1833 being—"When the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate and interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, *then such right shall be deemed to have first accrued at the time of such death.*"

Effect of statute on heir-at-law whose ancestor dies *in* possession.

Formerly, indeed, if a younger brother had entered generally on the death of the ancestor, his entry was in law that of his elder brother; Co. Litt. 242 a; Gilb. Ten. 28: and

Doctrine as to entry by one enuring for another

Case of heir-at-law.

abolished by ss. 12, 13 of 3 & 4 Wm. 4, c. 27.

S. 12.

Possession of one co-owner.

so, if one coparcener had entered generally, it would have preserved the right of the other; Co. Litt. 243 b, 373 b. This doctrine is, however, now abolished by ss. 12 and 13 of the Act of 1833, the operation of the former of which seems to be *retrospective* (see *Culley v. Doe*, 11 A. & E. 1008; *Doe v. Horrocks*, 1 C. & K. 566), of the latter *prospective* only, and which enact—

S. 12.—“When any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, *shall have been* in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed *to have been* the possession or receipt of or by such last-mentioned person or persons or any of them.” See *Burroughs v. M’Creight*, 1 Jones & L. 290; *Tidball v. James*, 29 L. J. Ex. 91, and the observations on, and explanation of, this case in *Murphy v. Murphy*, 15 Ir. C. L. R. 205; and *Hobbs v. Wade*, 36 Ch. D. 553.

S. 13.

Possession of younger brother.

S. 13.—“When a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, *shall* enter into possession or receipt thereof, such possession or receipt shall not be deemed *to be* the possession or receipt of or by the person entitled as heir.” See the effect of this section considered by way of illustration in the judgment in *Jones v. Jones*, 16 M. & W. 699, 712.

Heir-at-law whose ancestor dies out of possession.

As to the case in which the ancestor died out of possession, and after the statutory period had begun to run against him; in that case the heir has but as long as the ancestor would have had, had he continued to live; that case being provided for by the 1st branch of s. 3 as follows:—

“When the person claiming such land or rent, or *some person through whom he claims*, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land or in receipt of such rent, and shall while entitled thereto have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued *at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.*”

In *Doe v. Bramston*, 3 A. & E. 63 (more fully noticed, *post*, p. 693), the Court of Q. B. held the above clause of s. 3 applicable to the heir of a wife who, and whose husband seised in her right, discontinued the possession *whilst entitled thereto*. But in *Jumpsen v. Pitchers*, 13 Sim. 327, Shadwell, V.-C., held the clause inapplicable to a wife, or the heir of a wife, who, and whose husband seised in her right, relinquished the possession *in consequence of a conveyance by the husband*; a decision which coincides with Sir E. Sugden's opinion on such a state of facts, see V. & P., 11th ed., 631. The Vice-Chancellor was of opinion that the husband's conveyance had the effect of making that which was the wife's present estate a future estate within the meaning of the 4th branch of s. 3; see *Doe v. Liversedge*, 11 M. & W. 517; and *Rimington v. Cannon*, 12 C. B. 18.

Case of
devisee and
executor.

When s. 3
applicable to
heir of wife,
who and whose
husband
discontinue
possession.

Devisee.

In the case of a *devisee in fee* (who is a *hæres factus*) the right depends on the same words as that of the heir, and accrues at the same period, unless indeed in the possible case which will be hereafter adverted to. With regard to the devisee of a particular estate, his right also accrues at the period of the testator's death, since no person had any right to such estate before. See *James v. Salter*, 3 B. N. C. 544, *post*, p. 697.

Devisee.

In *Hawksbee v. Hawksbee*, 11 Hare, 230, a person occupied a house for several years as tenant from year to year, and finding, for fifteen years before his death, no one to receive the rent, he devised the house (with a power of sale under such conditions as might be deemed expedient), for the benefit of his wife and children. His eldest son occupied the house, paying a rent to the widow, for fifteen years after the death of the father, when the widow died. Upon these facts it was held that, notwithstanding the infirmity of the testator's title, the son could not insist on retaining possession of the house adversely to the devisees beneficially interested under the will, but that they were entitled to require that the property should be sold and distributed according to the testator's directions; see also *Asher v. Whitlock*, L. R. 1 Q. B. 1.

Person enter-
ing under
devise.

Hawksbee v.
Hawksbee.

In *Board v. Board*, L. R. 9 Q. B. 48, a somewhat similar question arose. In that case it was held that the widow of the testator, who took a life interest under the will and

Board v.
Board

Case of devisee
and executor.

entered under it, was estopped from disputing the remainderman's title under the will, though in fact the testator was only tenant by the curtesy, and therefore had no devisable interest. See *Re Stringer*, 6 Ch. D. 1, 10, *per* Jessel, M.R.

Paine v.
Jones.

On the other hand, where a testator died before the passing of the Wills Act, so that an estate purchased subsequently to his will did not pass thereby, and his widow, who was residuary devisee, entered, mistakenly supposing that it passed to her by the will, it was held that she acquired a title against the heir-at-law by twenty years' possession; *Paine v. Jones*, 22 W. R. 837.

Executor and Administrator.

Executor and
administrator.

The case of an *administrator* is expressly provided for by s. 6, which directs that he shall be deemed to claim as if there had been no interval between the death and the grant of administration; see *Re Williams*, 34 Ch. D. 558. The *executor* obviously falls within the same rule as the devisee in fee.

Remainderman and Reversioner.

Remainder-
man and
reversioner.

The position of a *remainderman* or *reversioner* was a great deal altered by the operation of the Act of 1833. Previous to the Act, it will be recollected, a person entitled to a vested remainder or a reversion had always twenty years after the arrival of the time at which his estate would, in the regular course of things, have come into possession; and such right appears still to be allotted to him by the 4th branch of s. 3, which enacts:—"When the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have *first accrued* at the time at which such estate or interest became an estate or interest in possession." But there are certain special provisions for the cases of forfeiture and of remainders expectant on an estate tail which will be noticed below. Since 1st Jan., 1879, the rights of remaindermen and reversioners have been somewhat abridged by the Act of 1874, see *post*, p. 654.

S 3.

Doe v. Liver-
sedge.

In *Doe v. Liversedge*, 11 M. & W. 517, an action of ejectment was brought by the assignee of a bankrupt to recover

possession of a copyhold estate which had been surrendered in 1798 to the use of the bankrupt and his wife for their lives, with remainder to the heirs of the husband, who became bankrupt in 1807, the bargain and sale to the assignee being executed in that year. The bankrupt had not been heard of from 1805, when he went abroad, but his wife continued to live upon the premises until her death in 1841, when the plaintiff was admitted under the surrender, and brought ejectment. It was contended that the right of entry first accrued in 1807, upon the execution of the bargain and sale, and was therefore barred; but the court held it to be a case of a *future estate or interest*, within the meaning of the above branch of s. 3, and that the plaintiff's right of entry only accrued upon the death of the wife in 1841; see, too, *Jumpsen v. Pitchers*, 13 Sim. 327.

Case of remainderman and reversioner.

As to what is a "future estate or interest."

Before the Act of 1833, a reversioner entitled to enter by reason of forfeiture had his option either to enforce the forfeiture or waive it—and, if he waived it, still retained his right of entering within twenty years after the arrival of the time at which his estate was limited to take possession. Now the 5th branch of s. 3 of the Act is as follows:—

When does statute run in case of forfeiture.

"When the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have *first accrued* when such forfeiture was incurred or such condition was broken." S. 3.

The effect of this, it was apprehended, might possibly be to oblige the reversioner to take advantage of a forfeiture on pain of losing his right of entry: and, to prevent such a construction, it was enacted, by s. 4, that "when any right to make an entry or distress or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right: the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened." S. 4.

The object of this section is to prevent the party entitled to an estate in remainder or reversion from being barred by his own clemency in not taking advantage of a forfeiture, or by his ignorance of its occurrence, and to secure to the per- Object of s. 4.

Case of remainderman and reversioner.

Astley v. Essex.

Right to account for equitable waste treated by analogy to right of entry.

S. 5.

Person in possession, going out to make room for one entitled to sub-interest, not barred of remainder of interest by that person's possession.

Object of s. 5.

son, who right has, the option of considering himself put to his right of entry or not, as he may think proper.

In *Astley v. Essex*, 18 Eq. 290, Jessel, M.R., held that these words "include every case of forfeiture or breach of condition, whether the effect of the forfeiture was to accelerate another estate under what is sometimes called a conditional limitation, or whether the effect of the forfeiture was merely to give a right to the heir to re-enter under the old common law rule; and that this section was intended to apply to both these cases, and consequently the original right of the remainderman to enter on the expiration of the previous estate in the natural way upon the death of the tenant for life is not taken away by the tenant for life committing a forfeiture."

In *Leeds v. Amherst*, 2 Phil. 117, by analogy to the rights of a remainderman under this statute, an account for equitable waste committed by the tenant for life was decreed against his representatives at the suit of the remainderman, thirty-eight years after the waste was committed, the plaintiff's remainder having fallen into possession within twenty years before the filing of the bill. "If," said Lord Cottenham, "equity is to follow the law, this court is bound to adopt the rule which the statute has laid down, and to allow the same time for making a claim of this kind which the statute gives for making a claim to the land itself."

S. 5 (repealed, but re-enacted with some additions, by s. 2 of the Act of 1874, see *post*, p. 655) enacted that "a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent."

The object of s. 5 of the Act of 1833 was, it seems, to prevent any doubt that might have arisen upon the question, whether a person being in possession of an estate, and then going out of possession to make room for somebody entitled to a sub-interest, could be barred of the remainder of his

interest by that person's possession. For instance : suppose A. to be in possession of an estate subject to a power of leasing vested in B., B. exercises the right by making a lease for twenty years. Now in this case s. 5 declared that the possession of the lessee for twenty years should not prevent A.'s regress at their termination, but that A.'s *right* should be considered to have accrued anew at the end of the twenty years, and the consequent determination of the lessee's estate.

Case of remainderman and reversioner.

It must, however, be recollected, that s. 5 applied only to cases where the owner of the estate is dispossessed by some one *rightfully* claiming a particular interest, as, in the instance above put, by one claiming under a power; s. 20 expressly providing that, where a person having a particular estate is dispossessed *by wrong*, the lapse of the statutory period shall bar, not only that estate, but also any subsequent one existing in the same person: unless, indeed, it be revested by the entry, not of the person dispossessed or his representatives, but of some one entitled to an intermediate estate, which, being previous to the estate in reversion or remainder of the person dispossessed, could not vest without causing the other to revest. Where, therefore, upon the death of another, a party became entitled to a term for lives and also to the reversion expectant upon its determination, under circumstances such as to render it doubtful whether there was a merger, but he did not take possession, and the property continued to be occupied by persons not entitled, and upon the last life falling in he brought ejectment, it was held that, even if there were no merger, yet reading ss. 5 and 20 together, the statute ran from the time when the title to the term accrued, and not from the determination of the term; s. 5 applying only in cases where another than the termor or person entitled to an interest in possession is also the immediate reversioner; *Doe v. Mouldsdale*, 16 M. & W. 689.

Only applies where disposssession is rightful.

S. 20 provides that "when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent: no entry, distress,

S. 20.

Where right to estate in possession barred, right of same person to future estate barred also, unless land recovered under another's intervening estate.

Case of re-
mainderman
and rever-
sioner.

or action shall be made or brought by such person, *or any person claiming through him*, to recover such land or rent, in respect of such other estate, interest, right, or possibility, *unless*, in the mean time, such land or rent shall have been *recovered by some person entitled* to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession."

Some curious questions might arise upon this section. Suppose A. to be tenant for life, remainder to B. for life, remainder to A. in fee. A. is disseised, and twenty years elapse without his re-entry. A. and his heirs are now totally barred by s. 20, so that no act which they can do can possibly entitle them to the remainder in fee-simple. B., however, whose right accrues upon the death of A., enters as of his life estate, and thereupon the remainder dependent upon it revests. Now, suppose A. to have devised this remainder—shall his devise operate on the estate revesting? or, as it could not operate at the time of his death, shall it not operate at all, and shall the remainder go to his heirs? This question, and others which might be suggested, would probably be found susceptible of argument.

Meaning of
"recovered."

In *Doe v. Liversedge*, 11 M. & W. 517, the Court of Exch. was of opinion that the words "*recovered by some person entitled*" are satisfied by the possession of such a person, though not in consequence of a recovery by process of law.

37 & 38 Vict.
c. 57, s. 2, as
to estates in
reversion, &c.

The Act of 1874, s. 2, provides that "A right to make an entry or distress or to bring an action *or suit* to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion *or remainder or other future estate or interest*, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land *or rent*, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land or in the receipt of such rent. But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land or in receipt of such rent at the time when his interest determined, no such entry or distress shall

be made and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress or bring any such action or suit to recover such land or rent."

Estates tail and re-
mainders and
reversions on
estates tail.

37 & 38 Vict.
c. 57, s. 2.

The first part of this section is a re-enactment of 3 & 4 Will. 4, c. 27, s. 5 (*ante*, p. 652), the words in italics having been added apparently to correct clerical errors of omission in that section.

The effect of the rest of the section is, that a reversioner, on succeeding to an estate in a case where time has begun to run and is running, has the residue of the period which would have barred his predecessor, or a fresh period of six years, whichever period is the longer, but no more; whilst if any reversioner is barred, the bar extends to any subsequent reversioner who claims under any deed, will, or instrument executed or taking effect after the original dispossession commenced. See *per* Lord Selborne, Charley's Real Property Acts, p. 43.

The proviso to s. 2 applies to the case where the person entitled to possession of the particular estate is out of possession, that is, where the right to possession and the actual possession are separated: in such cases a cause of action accrues to the owner of the particular estate, and on its cesser another cause of action accrues to the owner of the remainder, and the two periods mentioned in the enactment run respectively from the accruing of these rights of action. Therefore, when the owner of the particular estate has con-

Pedder v.
Hunt.

Estates tail
and remain-
ders and
reversions on
estates tail.

veyed away his estate, and the grantee is in possession when the particular estate determines, this part of s. 2 does not apply; *Pedder v. Hunt*, 18 Q. B. D. 565.

Estates tail and Remainders and Reversions on Estates tail.

Estates tail.

The right of issue of tenant in tail is barred by s. 2 of the Act of 1833 (now s. 1 of the Act of 1874), irrespective of ss. 21, 22; the more immediate object of the introduction of ss. 21, 22 being to provide for the estates in reversion and remainder subsequent to estates tail; see *Abergavenny v. Brace*, L. R. 7 Ex. 145.

Ss. 21 and 22 render a possession that would be destructive to the right of a tenant in tail destructive also to the rights of any person whom he could have barred; and s. 23 renders certain assurances coupled with possession for the statutory period operative against the remainder or reversion on an estate tail which otherwise would not have been so.

Ss. 21—23 are as follows (for s. 2, see *ante*, p. 641):—

S. 21.

When tenant
in tail barred
by statute,
persons whom
he might have
barred are
barred also.

S. 21. “When the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited which shall be applicable in such case: no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.”

S. 22.

Possession
against tenant
in tail shall
run on against
all whom he
might have
barred.

S. 22. “When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent: no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.”

S. 23.

Possession
under assur-
ance by tenant
in tail
operating to
bar issue, but
not remain-
ders, to bar

S. 23. “When a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of, his estate tail; and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of

such land, or in the receipt of such rent; and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of [*twelve*] years next after the commencement of the time at which *such assurance*, (if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed), would, without the consent of any other person, have operated to bar such estate or estates as aforesaid: then at the expiration of such period of [*twelve*] years such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail." S. 23 was repealed by the Act of 1874, but re-enacted in s. 6, the term of twelve years being substituted for that of twenty.

Estates tail and remainders and reversions on estates tail.

them after twelve years from time at which he could have barred them.

In *Penny v. Allen*, 7 De G. M. & G. 409, 426, Lord Cranworth said with regard to s. 23, "I have looked at it very attentively . . . The object of s. 23 was to give effect to acts of a tenant in tail against remaindermen and reversioners, and to give effect to assurances which, *although they were effectual to bar the issue*, were ineffectual to bar those entitled in remainder;" (e.g., a disentailing deed to which the protector has not consented). He therefore held that where a recovery had been suffered, which for want of a tenant to the *præcipe* did not of itself bar the issue, this section did not apply.

Object of s. 23; *per* Lord Cranworth, *Penny v. Allen*.

In *Morgan v. Morgan*, 10 Eq. 99, it was held, following *Penny v. Allen*, that s. 23 had no application to a case of possession for more than twenty years under a conveyance which, for want of enrolment, did not bar the issue. And this decision was followed by Hall, V.-C., in *Mills v. Capel*, 20 Eq. 692, who there said, referring to s. 23: "It was intended to legislate for the case of possession under a base fee. . . . The 'possession' 'by virtue of such assurance,' to be effectual under s. 23, must be a possession by virtue of an assurance which turned an estate tail into a base fee. Were this not so, remainders over might be barred by possession under a tenant for life."

Morgan v. Morgan.

Mills v. Capel.

The effect of the section seems to be, that the reversioners and remaindermen are barred, if before their right accrues twelve years elapse from the period when the person, who

Estates tail
and remain-
ders and
reversions on
estates tail.

No convey-
ance by
ancestor: his
issue barred
by his laches.

*Austin v.
Llewellyn.*

*Abergavenny
v. Brace.*

Where tenant
intail aliens
by innocent
conveyance,
statute runs
against issue:
quære from
what point.

executed the assurance *or his issue*, could have barred them. Thus the issue, though they have not executed the assurance, cannot by any act *prevent* the reversioners, &c., being barred by the act of their ancestor, though they can *accelerate* the bar by themselves executing a fresh assurance for that purpose. See Sugden's New Real Property Acts, 2nd ed., p. 85.

With regard to the *Issue in tail*. And first *where no conveyance has been made by their ancestor*. "If," said Alderson, B., in *Austin v. Llewellyn*, 9 Exch. 276, "a tenant in tail remains out of possession for twenty years, his *neglect* bars the issue in tail the same as if he had executed a disentailing deed and conveyed away the estate." Accordingly, in that case, where the plaintiff's claim in 1853 was as issue in tail of his father, tenant in tail, who had discontinued the possession about 1807 (under what circumstances did not appear), and had died in 1850, the father was held to have been barred by s. 21 and the son also. "In the present case," said Parke, B., "the heir in tail is barred by the *laches* of his ancestor." Indeed, so express are the words of that section that the argument for the plaintiff was that the court ought not to presume that the tenant in tail voluntarily abandoned his interest, when it was consistent with the facts that he had made a conveyance of his estate for his life only; an argument which, though it did not succeed, leads to the consideration of those cases *where there has been a conveyance by the tenant in tail*.

It should, however, first be mentioned that in *Abergavenny v. Brace*, L. R. 7 Ex. 145, the majority of the Court of Exch. held, *diss.* Bramwell, B., that the *laches* of the ancestor did not bar the heirs in tail who claimed under a private statute of 2 & 3 Ph. & M., which provided that "no feoffment, discontinuance, fine, or recovery, with voucher or otherwise, *or any other act or acts* thereafter to be made, done, or suffered, or acknowledged of the premises, &c., should bind or conclude or put from entry," *inter alios*, "any of the heirs in tail."

Next, *where a conveyance has been made by the ancestor*.

Before the statute, if tenant in tail had aliened by an innocent conveyance, *e.g.*, lease and release, the issue might, upon his death, have entered; if he had aliened by a tortious one, *e.g.*, a feoffment, a discontinuance took place, and they were put to their *formedon*. In both cases the right of the issue *first accrued* upon the death of the ancestor: so that,

supposing the tenant in tail, *since* the statute, to alien by an innocent conveyance, there may be question made whether the issue would be barred at the expiration of the statutory period from that conveyance, or whether they would still retain their right to enter within that period after the death of the ancestor. In support of the latter view they would urge that ss. 21 and 22 could not apply, since those are only aimed at cases where the ancestor's right is affected by lapse of time, and *by reason of an entry or action not having been made or brought*, not where his right has been determined by his own conveyance, after which he could not make any entry or bring any action whatever; and that, in truth, the effect of the innocent conveyance is merely to pass to the purchaser such an interest as the tenant in tail could lawfully grant, leaving the rights of the issue untouched. On the other hand, it would perhaps be urged that the case fell within the first branch of s. 3 (*ante*, p. 641), and was a case in which a person *through whom* the issue claimed had been in possession in respect of the estate claimed, and had, *while entitled thereto*, discontinued such possession. But the words in italics form an argument against this latter construction, since, upon executing the conveyance, he would have ceased to be entitled, and consequently would not have discontinued his possession *while entitled thereto*.

Estates tail
and remain-
ders and
reversions on
estates tail.

Accordingly, in *Rimington v. Cannon*, 12 C. B. 18 (in error), the Court of Exch. Chamber held, affirming the judgment of the C. P., that the discontinuance of possession in s. 3 is *the ceasing to possess when the party so ceasing has a right to possess*; which a tenant in tail cannot have after he has conveyed his estate to another. And see *Abergavenny v. Brace*, L. R. 7 Ex. 145; *Pedder v. Hunt*, 18 Q. B. D. 565, *ante*, p. 656.

Time runs
from cesser
of possession
by party
having a right
to possess.

Suppose, next, that the tenant in tail were to convey by feoffment, this would have discontinued the estate tail before the Act: but, discontinuance being abolished by s. 39, this case also perhaps stands on the same footing as that of an innocent conveyance. Cases however may still arise of feoffments by tenants in tail, made at a time when these operated to discontinue the estate tail, and such was the case of *Cannon v. Rimington*, 12 C. B. 1, 18, where the feoffment was made in 1798, and the death happened in 1831. But if, as was there the case, the issue in tail should prove to have been *on the 1st June, 1835*, entitled to maintain a writ of formedon, the only difference between such a

Effect of feoff-
ment by a
tenant in tail

Estates tail
and remain-
ders and
reversions on
estates tail.

Ss. 21 & 22
inapplicable
where issue
claims against
one in posses-
sion under
conveyance
from tenant
in tail.

Court will not
presume a con-
veyance.

Ss. 21 and 22
retrospective.

*Doe v. Wood-
roffe* ; 21
Jac. 1, c. 16,
was applic-
able where no
right of entry
available to
heir in tail.

feoffment and one not operating to create a discontinuance would, so far as respects the matter in hand, seem to be that the question would have arisen in an action of formedon and not of ejectment; should, however, the issue in tail claiming against his ancestor's feoffment, where this operated by way of discontinuance, *not* have been able *on the 1st June, 1835*, to maintain a writ of formedon, *e.g.*, should his ancestor have been alive on that day, he would seem to be remediless, unless his case fall within the saving of s. 38; as to which, that it does not, see Sugd. R. P. Statutes, 94, and that it does, 1 Hayes' Conv. 237. Feoffments now have no tortious operation; 8 & 9 Vict. c. 106, s. 4.

It appearing then that ss. 21, 22 are inapplicable to the case of the issue claiming against one in possession under a conveyance from the tenant in tail, it remains to notice that the court will not, in the absence of proof, presume that a defendant claims under a conveyance; for this *Austin v. Llewellyn*, 9 Exch. 276 (*ante*, p. 658), is an authority; there Parke, B., observed, "If, indeed, it had *appeared* that the tenant in tail had made a feoffment, then, according to the authority of *Cannon v. Rimington*, the issue in tail would have a remedy;" but the court, as before intimated, would not so presume.

It may be added that Kindersley, V.-C., in *Goodall v. Skerratt*, 3 Drew. 216, expressed an opinion that s. 21 is retrospective, and decided that s. 22 is so. Indeed, that s. 21 is retrospective, where the estate tail was continuing when the Act of 1833 passed, was in effect decided by *Austin v. Llewellyn*, *supra*, inasmuch as but for that Act the plaintiff's title would only have accrued upon the death of his father in 1850 (according to the case of *Doe v. Pike*, 3 B. & Ad. 738), no proof having been given that the possession relied on by the defendant was adverse; but, by the retrospective operation of s. 21, the seventeen years elapsed since the passing of the Act were connected with those before it, and so, the tenant in tail being barred, his issue was likewise barred.

In *Doe v. Woodroffe*, 10 M. & W. 608, 15 Id. 769, a case under 21 Jac. 1, c. 16, A., tenant in tail special, aliened in 1735 by an innocent conveyance to B., the heir in tail, who during A.'s life suffered a recovery. A. died in 1767, B. died in 1779: the Court of Exch., and afterwards the Exch. Cham., held that the right of entry of the heirs in tail still subsisted in the year 1790: for that, up to the death of

B., there never was any *available* right of entry in any person, and it never could have been the intention of the statute to take away the right of entry unless an available right of entry had descended upon some person who had neglected to take advantage of it. *Doe v. Woodroffe* was affirmed by the H. L. on a writ of error, 2 H. L. C. 811.

Remainders
and rever-
sions on
estates tail.

Next, as to the *Remainderman* or *Reversioner* :—And first *where there has been no conveyance by tenant in tail*. It has been held that if the statute once begin to run against the tenant in tail, and he die before the lapse of the statutory period without issue inheritable under the entail, the remainderman though under disability will, notwithstanding s. 16 (*post*, p. 692), have only what is then left of the statutory period to make his entry under s. 22 ; and it has been likewise decided that s. 22 is retrospective.

Remainder-
man or
reversioner.
(1) Where no
conveyance by
tenant in tail.

Both these points were decided by Kindersley, V.-C., in *Goodall v. Skerratt*, before referred to. In that case A., tenant in tail, with remainder to B. an unmarried, and C. a married sister, as tenants in common in tail, with cross remainder in tail between them, died in 1830 without issue, having previously sold the estate to the defendant, who had remained in possession more than twenty years from the death of A., and no conveyance was executed. B. died unmarried in 1831. It was held that C., being under disability as to her own share, was not barred by the statute, her rights being saved by s. 16 ; but as to the share which devolved upon her at the death of B., it was decided, *first*, that on the death of A. the statute began to run against B., and, *secondly*, that it continued to run against C., who was therefore barred. The decision that the disability of the remainderman does not protract the time otherwise sufficient to bar him, seems alike consistent with the words and spirit of ss. 21, 22, which for the purposes of the statute identify him as well as the issue with the tenant in tail, against whom the statute has begun to run, or to use the language of the learned judge, “time having once begun to run against her (C.) through B., as it did from the time of A.’s death, it continued to run against her, notwithstanding that when her remainder fell into possession she was under disability.” The decision, however, that the statute *did* begin to run against B., may be thought a very strong one, since when it passed it found C. not B. entitled to the possession, the remainderman and not the tenant in tail, whose laches it makes equivalent to his disentailing assurance. It is not

Statute goes
on running
though
remainderman
under dis-
ability.
Goodall v.
Skerratt.

Remainders
and rever-
sions on
estates tail.

easy to see how the case of B., who died in 1831, was one of a tenant in tail dying "before the expiration of the period hereinbefore limited, which (in 1833) *shall be* applicable in such case" within s. 22; and it may perhaps still be argued on the authority of *Doe v. Page*, 5 Q. B. 767, and *Doe v. Moore*, 9 Id. 555, both hereafter noticed, that that section is only retrospective where there has been at least a continuing estate tail at the time the statute passed.

(2) Where
conveyance
by tenant
in tail.

Next, *where there has been a conveyance by the tenant in tail*. It seems that wherever a voidable fee simple is created by the tenant in tail, whether by a tortious or an innocent conveyance, the right of the remainderman or reversioner is to a *future estate* within the meaning of the 4th branch of s. 3 (*ante*, p. 642), and is governed thereby.

On death of
tenant in tail
statute runs.

In all the above cases it is obvious that, on the death of the tenant in tail who made the conveyance, the statute will begin to run against some one. See the observations of Sir E. Sugden on these sections, V. & P. 11th ed.

Doe v.
Edmonds.

In *Doe v. Edmonds*, 6 M. & W. 295, the Court of Exch. were of opinion that, where there was an estate for life, remainder in tail, and the tenants for life and in tail (after an adverse possession had commenced) suffered a recovery, and declared the use of it to A. for life, remainder to the original tenant for life, remainder to the late tenant in tail for life, remainders over to his issue, remainder to B. for life, and the late tenant in tail died without issue: B. had the same time to enter that the tenant in tail would have had had there been no recovery.

Landlord.

Landlord's
case branch
of that of
reversioner.

The case of a landlord is, of course, only a branch of that of the *reversioner* (*ante*, p. 650). There are, however, some peculiar considerations applicable to it. By the word *landlord* I understand a *reversioner in the actual receipt, or entitled to the actual receipt, of the rent of the land*.

Formerly
landlord
might *always*
enter within
20 years of
expiration of
lease.

Now, previous to the Act of 1833, the rule was that the landlord had a right to enter at the expiration of the lease, or within twenty years afterwards, even though he might, during the whole period that the lease had to run, have discontinued the receipt of the rent due from the tenant; for it was a maxim, that neither non-payment of rent nor payment of rent to the wrong person could amount to an ouster, since

no person by wrong could gain another's right; B. N. P. 104; *Elvis v. Archbishop of York*, Hob. 315, 322. This rule, which was the same in all cases, is however considerably altered by the Act of 1833.

Landlord and tenant.

The general rule regarding *reversioners* is promulgated in the 4th branch of s. 3 (set out, *ante*, p. 642), and is that, when "no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then *such right shall be deemed to have first accrued at the time when such estate or interest became an estate or interest in possession.*"

General rule now as to reversioner.

In the cases of landlord and tenant, it should first be noted that no doctrine as to the imputation of the tenant's possession to the heir (*Bushby v. Dixon*, 3 B. & C. 298) can affect the enactment by rendering the possession of the tenant the possession of the heir so as to prevent the statute from running against the latter; see *Lyell v. Kennedy*, 18 Q. B. D. 796, 14 App. Cas. 437.

Possession of tenant is not possession of heir.

Then the following qualifications are to be remarked:—

First, By s. 7, in the case of a *tenancy at will*, the tenancy, if not determined sooner, is deemed to be determined *at the expiration of a year*; and if the landlord neglect for *twelve* years after that time either to enforce payment of rent or claim possession of the land, it seems that his right to do so will be extinguished. See *Doe v. Thompson*, 6 A. & E. 721.

Qualifications as to landlords.

(1) In case of tenancy at will.

S. 7 provides that "when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, *as tenant at will*, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined; provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

S. 7.

In *Doe v. Turner*, 7 M. & W. 226, the defendant had entered by the permission of the plaintiff in 1817, and continued in possession till 1839; no rent had been paid, but about the year 1827 the plaintiff had entered and cut stone, without the defendant's consent. Parke, B., ruled that this was a determination of the will, and that a new tenancy

Distinction between case of tenancy at will and at sufferance.

Doe v. Turner.

Landlord and
tenant at will.

commenced on the defendant's retaining possession after that period; and, consequently, that the twenty years had not run, and that the plaintiff must recover.

Doe v. Turner.

Upon a motion for a new trial, the court were of opinion that the learned judge had rightly directed the jury that the landlord's entry to cut stone in 1827 was a determination of the tenancy at will, and they were further of opinion that if, on the determination of the tenancy at will, a new tenancy at will commenced, the period of limitation would run, not from the commencement of the *old*, but from that of the *new* tenancy. But they thought that if, upon the determination of the first tenancy at will, a tenancy at sufferance commenced and continued down to the expiration of the statutable time of limitation, that is, to the end of twenty years from the termination of the year next after the commencement of the first tenancy, the operation of the Act could not be stopped by the conversion of the tenancy at will into a tenancy on sufferance. And in that case they thought the lessor of the plaintiff would be barred. And they granted a new trial in order that the jury might be asked whether, after the determination of the original tenancy in 1827, the tenancy on sufferance thereby occasioned was permitted to continue, or a new tenancy at will created by the parties.

The case was again tried; and the jury found that a new tenancy at will was created. On the second trial the jury were directed by the judge, that, the tenancy at will having been determined, it was for them to determine whether a fresh tenancy at will was created, and if so the plaintiff would be entitled to recover upon any construction of the statute; a bill of exceptions was tendered, and the Court of Error, declining to give any opinion as to what would have been the effect of the statute had the tenancy at will been succeeded by a tenancy at sufferance, held the direction of the learned judge to be correct upon the facts; *Turner v. Doe*, 9 M. & W. 643. See also *Doe v. Rock*, 4 M. & Gr. 30.

Opinion that
tenancy at
will (created
before the
statute),
followed by
tenancy at
sufferance or
adverse pos-
session,

After the decision in *Doe v. Turner*, the general impression at the bar is believed to have been that a tenancy at will, created before the statute, and followed immediately either by a tenancy at sufferance or an adverse possession, would operate as a bar, provided the tenancy at will and adverse possession, or tenancy at sufferance, taken together, had continued for twenty-one years without payment of rent

or acknowledgment of title, and this was supposed to be involved in the opinion expressed by the Court of Exch. in *Doe v. Turner*, 7 M. & W. 226, 234, that "if, when the original tenancy at will determined in 1827, no new tenancy at will had been created, but the tenant had continued to occupy merely as tenant by sufferance, then the reasoning of the defendant would be correct. . . . The right to bring an action, which by the express provision of s. 7 undoubtedly accrued to the plaintiff in 1818, would have continued uninterrupted during the succeeding twenty years, and, not having been exercised during that period, would have been barred." Accordingly, the question, whether the tenancy at will was in that case succeeded by a tenancy at sufferance or by a new tenancy at will, was the only question to determine which a second trial was directed, and the only question which was left to the jury upon that new trial; a question which was, however, obviously immaterial to the ultimate decision of the case, unless the time of limitation would, in the event of a tenancy at sufferance being found to have succeeded the tenancy at will, have run from 1818, the time at which the first year of the tenancy at will expired.

Landlord and
tenant at will.

operated as
bar after
21 years.

However, the Court of Q. B. in the subsequent case of *Doe v. Page*, 5 Q. B. 767, pronounced a judgment, which appears to be founded on a different view of s. 7 from that taken by the Court of Exch. in *Doe v. Turner*. In *Doe v. Page*, the father of the plaintiff had inclosed a piece of waste in 1802, and had died in 1816, leaving a widow, who occupied till 1832, but, as the jury found, occupied as tenant at will to her son, who was heir to his father. In 1832 (before the Act of 1833) the widow died, and the defendant then entered and held till the commencement of the action in 1841, adversely to the plaintiff. Under these circumstances the court held that the plaintiff was entitled to recover. "We are of opinion," said Lord Denman, delivering judgment, "that s. 7 only applies to cases of tenancies at will existing at the time the Act passed, or subsequently; and that it does not apply to cases where the tenancy at will had been determined before the passing of the Act."

But *contra* in
Doe v. Page,
held that s. 7
does not
apply to
tenancies
determined
before the Act

Now in *Doe v. Turner*, the first tenancy at will had determined *before the passing of the Act*, viz., in 1827, and it seems difficult to reconcile the opinion of the Court of Exch. that, if succeeded by a tenancy at sufferance, it would have operated as a bar, with the grounds of the decision of the Court of Q. B. in *Doe v. Page*.

Landlord and
tenant at will.

Doe v. Turner
and *Doe v.*
Page dis-
cussed in
later cases.

In two cases, subsequently decided in the Court of Q. B., *Doe v. Angell*, 9 Q. B. 328, and *Doe v. Moore*, Id. 555, the decision in *Doe v. Page* is adverted to, and put upon the ground rather that the tenancy at will had been determined before the passing of the Act, than that s. 7 was wholly prospective; indeed *Doe v. Moore* expressly decides s. 7 to be so far retrospective as to apply to tenancies at will existing at the time of the passing of the Act. "Although," (says Lord Denman, in delivering judgment) "in *Doe v. Page*, that section was held not to be retrospective, yet it certainly applies where there has been no express act done to determine the tenancy at will up to the time of the passing of the statute." And accordingly it was held in *Doe v. Moore* that a tenancy at will existing for twenty-one years before and at the time of the passing of the Act was a bar, no action having been brought within five years after the Act passed. In the judgment in *Doe v. Angell* it is stated that the Court of Exch., in *Doe v. Sumner*, 14 M. & W. 39, "agree that *Doe v. Page* was rightly decided." That case, however, proceeded, not upon s. 7, but upon s. 8, and in the later case of *Jones v. Jones*, 16 M. & W. 699, 712, where the effect of tenancies at will determined before the passing of the Act is incidentally discussed in the judgment, the Court of Exch. observed a degree of caution upon the subject scarcely consistent with an opinion that *Doe v. Turner* had ceased to be law. In *Doe v. Carter*, 9 Q. B. 863, the Court of Q. B. appear to have cited and reasoned upon *Doe v. Turner* without disapprobation; but in the later case of *Doe v. Bold*, 11 Q. B. 127, the court, after taking time to consider the point, are reported to have treated it as "*clear that the determination of an estate at will before the statute passed gives a right of entry commencing at that time,*" as decided in *Doe v. Page*.

Semble, that
Doe v. Page
preferable to
Doe v. Turner.

It is submitted that the decision in *Doe v. Page* is more in conformity with the words of s. 7 than the opinion expressed in *Doe v. Turner*, and less likely to produce injustice: for although the hardship alluded to in the judgment in *Doe v. Page* would only exist where the tenancy at will, having been determined before the Act, was succeeded by an adverse possession and not by a tenancy at sufferance (the latter case being within the protection of s. 15), yet it seems clear that the same construction must apply in both cases, there being no words in s. 7 upon which a distinction between them could be founded.

In *Randall v. Stevens*, 2 E. & B. 641, some doubt appears to be thrown upon the main proposition supposed to have been established by *Doe v. Turner*, namely, that, although the determination of a tenancy at will within twenty-one years from its commencement would operate as a bar to the running of the period of limitation if succeeded by a fresh tenancy at will in the same person, yet, if *succeeded by a tenancy at sufferance*, it would not have that effect, such tenancy at sufferance together with the tenancy at will extending beyond twenty-one years from such commencement.

Landlord and tenant at will.

Doubt as to whether the statute goes on running when tenancy at will is followed by tenancy at sufferance.

In *Randall v. Stevens* a person was let into possession of a house as tenant at will before the passing of the Act of 1833, and never paid any rent. After the statute passed and before twenty-one years elapsed from his being let into possession, the landlord entered and turned the tenant out of possession; the latter shortly after on the same day resumed it, but the jury found that no fresh tenancy at will was then or afterwards created, nor was any rent paid. It was held that the landlord was entitled to enter at any time before the lapse of twenty years from the resumption of possession by the tenant, although it might be after the lapse of twenty-one years from the commencement of the tenancy at will, and that he was not barred under ss. 2, 7, and 10 of the statute. In this case the court observed: "It is difficult to contend that universally every tenancy at will shall be deemed to have expired by operation of law at the expiration of one year after its commencement: and the more reasonable construction to put upon the enactment might have been, that, where there has been no actual determination of the tenancy by act of the parties within twenty-one years, it shall be deemed to have determined at the expiration of the first year; making an occupation of twenty-one years without payment of rent a bar; *but where there has been an actual determination of the tenancy within that period* whereby a new right of entry accrues, this clause of the statute shall have no operation, 'such tenancy' being supposed by the statute to continue till the right of entry is barred." And in a later part of the same judgment the court proceeded as follows: "A number of cases were cited in the argument to show that, if, after the determination of the tenancy at will independently of the statute, the tenant continues in possession at sufferance till the expiration of twenty-one years from the commencement of the tenancy,

Randall v. Stevens. If, after one year, but within twenty-one, tenancy actually determined, does the statute run afresh?

Landlord and
tenant at will.

the statute is a bar. We do not consider it necessary on this occasion to examine these cases; and it may be too late now to consider, except in a court of error, whether, where the tenant has remained in possession continuously for twenty-one years, the tenancy at will being determined during that time by an act of the landlord without his actually having been in possession, there be any ground for the distinction as to the operation of the statute between a subsequent tenancy at sufferance and a new tenancy at will, which is allowed to create no bar." See *Solling v. Broughton*, (1893) A. C. 556.

In *Day v. Day*
question of
actual deter-
mination held
irrelevant
where no new
tenancy at
will.

However, in *Day v. Day*, L. R. 3 P. C. 751, the Judicial Committee declined to go into the question whether there was an *actual* determination of a tenancy at will subsequently to the first year, in a case where the jury had not improperly found that *no new tenancy at will* was created, whether there was an actual determination of the old one or not.

Their lordships say (p. 760): "The reasonable construction of this provision (s. 7) is (according to Lord St. Leonards), that the right shall accrue ultimately at the end of a year from the commencement of the tenancy at will, though it may accrue sooner by the actual determination of the tenancy. . . . It seems to their lordships that, as in this case the statute began to run from May, 1843 (the end of the first year), the question of a subsequent determination of the original tenancy is only relevant so far as it may have been preliminary to the creation of a fresh tenancy at will after the determination of the first, and within the period of limitation. In any other view such a determination of the original tenancy after the end of the first year is *per se* irrelevant. When there is an alternative given by the statute sufficient to set it running, it would be inconsistent with its purpose to allow the running to be stopped by the happening of that which, if time had not been running, would in itself have set it running. The actual subsequent determination of the tenancy could only have the effect of making the tenant for *all* purposes—when he was already from the end of the first year for the purposes of the bar of the statute—a tenant at sufferance."

At any rate,
where new
tenancy at
will created,
fresh right of
entry accrues.

But, whether the opinion expressed in *Doe v. Turner*, as to the distinction just referred to in the effect of tenancies *at will* and *at sufferance*, be accurate or not, the rule laid down in that case, namely, that, if, before the right of entry

upon a tenant at will is gone, the tenancy is put an end to and a new tenancy *at will* is created by fresh agreement, express or implied, between the parties, *a fresh right of entry accrues and an additional period of twelve years must run before the entry is barred*,—has been fully recognised in the later cases, and is, it is apprehended, in full force; see *Hodgson v. Hooper*, 3 E. & E. 149, and *per Erle, C.J.*, and Willes, J., in *Locke v. Matthews*, 13 C. B. N. S. 753, where it is explained that the *seventh* section does not mean that the statutory period shall begin to run from the end of the first year after the person who shall have been in possession, or in receipt of the profits of the land, shall have begun to hold in the capacity of tenant at will generally, but from the end of the first year after the commencement of the tenancy at will which existed next previously to the question being raised whether a title had been acquired under the statute.

Landlord and
tenant at will.

Statutory
period runs
from end of
first year of
tenancy last
created.

Willes, J., in this last case, after citing the latter part of the judgment in *Randall v. Stevens* which has just been mentioned (*ante*, p. 667), observes: "It may be that on the true construction of the statute the periods of the original tenancy at will and the subsequent tenancy on sufferance could not under such circumstances be united so as to make up the period of limitation required by the statute: but in order to raise that point recourse must be had to a court of error:" a passage which, in the report in the 13 C. B. N. S., is made by mistake to appear to be a quotation from the judgment in *Randall v. Stevens*.

In *Locke v. Matthews* the facts were that the plaintiff's father had enclosed a bit of waste land in 1830, built a cottage on it and remained in possession without paying rent or acknowledging the title of the owner of the fee until 1845, when the latter served him with a declaration in ejectment, but afterwards consented to allow him to remain, during his life, in possession of a portion of the land. The plaintiff's father lived, and occupied this portion, until 1861. Upon these facts the court was of opinion that what had taken place in 1845 amounted to an actual entry by the owner of the fee determining the original tenancy at will, and operating to create a new tenancy; and consequently that the prescribed period of limitation was to be reckoned from that time.

Locke v.
Matthews.

In *Hodgson v. Hooper* the parish officers of a parish had been for many years, and were, at the time of the passing of the Act of 1833, possessed of a piece of land belonging to

Hodgson v.
Hooper.

Landlord and
tenant at will.

the lord of a manor, under circumstances which showed, in the opinion of the court, that they were tenants at will, and before the lapse of five years from the passing of the Act a fresh tenancy at will was created in persons who held on behalf of the parish. Before twenty-one years from the commencement of the last-mentioned tenancy had elapsed, the lord entered upon the land with the consent of the parish and took possession. The court held, upon a case stating these facts, that the lord had not lost his title to the land; a decision evidently consistent with the interpretation put upon the statute in *Doe v. Turner*.

Lease voidable
under 13 Eliz.
c. 10, s. 3.

In the case of a lease *voidable* at law under 13 Eliz. c. 10, s. 3, the C. A. held, by analogy to the case of a tenancy at will, that the right of entry accrues and the period of limitation commences from the granting of the lease; *Magdalen Hospital v. Knotts*, 8 Ch. D. 710. On appeal, it was held by the H. of L. that the statute ran from that time, but on the ground that the lease in question was *void*, and not *voidable* only; 4 App. Cas. 324. In the case of a lease, void for not being in conformity with the Mortmain Act (9 Geo. 2, c. 36), Kay, J., held that the statute began to run against the grantor, if not from its execution, at any rate from the time when rent ceased to be paid; *Webster v. Southey*, 36 Ch. D. 9.

Lease void
under Mort-
main Act.

In *Mayor of Brighton v. Guardians of Brighton*, 5 C. P. D. 368, a corporation was held to be barred by s. 7, though a private Act prohibited the corporation from selling or letting without the consent of the vestry, there being no words in the private Act apt to exclude, or capable of excluding, the operation of the statutes of limitations.

(2.) Case of
tenant under
lease not in
writing,
governed by
s. 8.

Secondly, In the case of a *tenant holding under a lease not in writing*, it appears from the provisions of s. 8 that his landlord's right is to begin to run at the end of one year (if he be a tenant from year to year), or at the end of the first period of his tenancy (if he be a tenant for any other period), unless indeed rent have been subsequently paid; for then the right will commence from the last payment, and the landlord will be barred at the expiration of *twelve* years from the date of such last payment.

S. 8. Right
accrues at end
of first period
of tenancy or
from last pay-
ment of rent
(which shall
last happen).

S. 8 provides that "when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, *without any lease in writing*, the right of the person entitled subject thereto, or of the person through whom he claims, to make

an entry or distress or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).” This section has been held to apply to tenancies from year to year created before, and existing at, the time of the passing of the Act; *Doe v. Sumner*, 14 M. & W. 39; and in order to prove payment of rent, so as to take a case out of its operation, a verbal admission of the fact by the occupier, or any person under whom he claims, is evidence; *Doe v. Beckett*, 4 Q. B. 601. As to what is not “a lease in writing” within the section, see *Doe v. Gower*, 17 Q. B. 589.

Landlord—
Tenant under
lease not in
writing.

Thirdly, in the case of a tenant holding under a lease in writing, the yearly rent reserved on which amounts to twenty shillings. If the rent has been received by some person wrongfully claiming to be entitled to the reversion, and no rent has been subsequently received by the rightful landlord, the landlord’s right is deemed, by s. 9, to have first accrued from the period when the wrongful receipt commenced.

(3.) Tenant
under written
lease at yearly
rent amount-
ing to 20s.,
where rent
paid to other
than true
reversioner,
governed by
s. 9.

This is a perfectly new enactment; for, under the former statutes, receipt of rent never constituted an *ouster*; *Gilb. Ten.* 97; *Goodright v. Jones*, *Cruise on Fines*, 3rd ed., 295; *Doe v. Danvers*, 7 East, 299. And the policy on which it is based is thus explained by the Real Property Commissioners in their Report, p. 47: “Another rule is (speaking of the then law), that in the case of a lease, adverse possession, so as to bar the reversioner, does not commence till the expiration of the term. Where rent is reserved on a lease, we consider it more reasonable that the limitation should run from the time when the rent began to be received by a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the lease. The receipt of rents and profits is equivalent to the occupation of the soil; the person who is in receipt of them can do nothing more to establish his rights, and the person to whom they are denied is virtually dispossessed.”

S. 9 provides that “when any person *shall* be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards *shall be* reserved, and the rent reserved by *such* lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately

S. 9. Right
accrues from
first wrongful
receipt of
rent.

Landlord.

expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto: the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

Doe v. Angell.

In *Doe v. Angell*, 9 Q. B. 328, a testator demised certain lands and premises in 1776 for sixty-one years, and died in 1784, from which time to 1837, when the action was brought by the plaintiff claiming as devisee of the testator, the rent under the lease had been received by the defendant's father and himself, claiming also as devisees. It was held that the case was within s. 9, and that the plaintiff would have been barred had he not brought his action under s. 15 within five years after the passing of the Act.

In cases (1) and (2) tenant may acquire right; in (3) tenant cannot;

but wrongful payee of rent does; s. 35.

It will be observed that in the two first of the three cases above pointed out—that, namely, of the tenant at will, and that of the tenant holding under a lease not in writing,—the tenant may himself, in *twelve* years after the period fixed for the commencement of the landlord's right, acquire a right against his own landlord; while, in the third case, that, namely, in which the tenant holds under a written lease,—*he* never can acquire a right against his landlord; for the time of limitation does not begin to run till payment of rent by him to some third person, at the expiration of *twelve* years from which time the right is acquired, not by the tenant, but by the third person to whom he so pays rent; for it is enacted by s. 35 that "the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee, or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act."

Effect of mere non-payment of rent as to right to arrears.

And it has been decided that, in the case of mere non-payment of such a rent for twenty [now *twelve*] years, the landlord does not, *under section 2*, lose his right to recover arrears less than twenty [now *twelve*] years old; *Grant v. Ellis*, 9 M. & W. 113. See also *De Beauvoir v. Owen*, 5

Exch. 166, 179, and *per* Lord Cranworth and Lord Wensleydale in *Archbold v. Scully*, 9 H. L. C. 360, where, a question arising as to the effect of the non-payment of rent under an Irish lease, the former said, "It is now clearly established that so long as such a relation (the relation of landlord and tenant under a lease in writing) subsists as a legal relation, the landlord's right to rent is not barred by non-payment for however long a time;" and the latter added, "His (the tenant's) neglect or refusal to pay rent is nothing. . . . In truth the only period of limitation, where lands are held under a lease in writing, is twenty years from the payment of rent to a third person."

S. 42, however, limits the arrears of rent which in such cases are recoverable to six years; see *Archbold v. Scully*, *supra*.

The words "*wrongfully* claiming to be entitled" (in s. 9) mean that a person not entitled has made a claim to, and has received, the rent as against the person really entitled; they include a claim to, and receipt of, rent made by mistake; *Williams v. Pott*, 12 Eq. 149. See also *Leybourn v. Gridley*, 61 L. J. Ch. 352.

With regard to the other cases between landlord and tenant, those, namely, *where the lease is in writing but the rent less than twenty shillings, and where the lease is in writing, and the rent has not been paid to any tortious claimant*, though the rightful landlord may have discontinued the possession of it—those cases stand upon the general rule laid down in the 4th branch of s. 3 (*ante*, p. 642), and the reversioner's right to enter accrues on the determination of the particular estate. See *Doe v. Oxenham*, 7 M. & W. 131; *Fulton v. Creagh*, 3 Jones & L., 329; *Drew v. Norbury*, Id. 267; *Doe v. Gopsall*, 4 Q. B. 603 (b); and *Chadwick v. Broadwood*, 3 Beav. 308, over-ruling the opinion said to have been expressed by Lord Abinger, in *Ex p. Jones*, 4 Y. & C. 466.

The reason for this is, that, where a rent of less than twenty shillings is reserved, the sum is of so small importance that the true landlord may possibly neglect to enforce payment of it, and the tenant in possession may not think it worth his while to look strictly into the title of the person demanding it from him: indeed, the former reason is expressly given by the commissioners at the conclusion of the passage the commencement of which is above cited (*ante*, p. 671). And where the lease has been reduced to writing, there can at no period be any difficulty in ascertaining on what terms the tenant entered, and con-

Landlord.

Right to arrears barred in six years; s. 42.

"Wrongfully claiming to be entitled."

(4) In other cases, landlord's right to enter accrues on determination of term.

Reason for the distinction.

Landlord.

Doe v. Bingham. Landlord barred by non-payment of rent from recovering in ejectment under proviso for re-entry. Not law.

sequently it would be wanton to allow *him* to acquire a title to the fee in contravention of the terms of his own written muniment.

In *Doe v. Bingham*, 3 Ir. L. R. 456, the Court of C. P. in Ireland held that a landlord who had not received rent for more than twenty years from his tenant holding under a lease, was barred by the 3 & 4 Will. 4, c. 27, ss. 2 & 3, from recovering in ejectment for non-payment of rent, under a proviso in the lease "that if the said reserved yearly rent or any part thereof, should happen to be unpaid, &c., then, and so often as it should so happen, &c. it should be lawful for the said F. C., &c., to enter, &c." The court was strongly pressed with the anomaly of allowing the landlord to recover at the end of the term or within twenty years after, and of yet not allowing him to recover during the term for non-payment of the rent. Admitting, however, the anomaly, the court thought the words of the statute too strong to be got over. But it seems impossible to reconcile this case with that of *Doe v. Oxenham*, *supra*; see *per* Alderson, B., in *Owen v. De Beauvoir*, 16 M. & W. 547, 560; and the case of *Doe v. Bingham* cannot now be considered law. See *Spratt v. Sherlock*, 3 Ir. C. L. R. 69.

Acknowledgment causes term of limitation to run *de novo*.

It will be recollected that, in cases of landlord and tenant, as well as in all other cases arising on this Act, an acknowledgment such as is prescribed by s. 14 (*post*, p. 690), will prevent the time of limitation from barring, and cause it to begin to run *de novo* from the date of the acknowledgment.

Ss. 7, 8, 9, alter operation of s. 2.

It may be observed upon ss. 7, 8 and 9, that they do not, like s. 3, contain merely examples of the operation of s. 2, but enactments altering the operation which s. 2 would otherwise have had. Thus, in the case of a tenancy from year to year, not created by writing, had it not been for s. 8, the right contemplated by s. 2 would not have accrued till the determination of the tenancy by notice to quit or surrender. So, in *Doe v. Angell*, *ante*, p. 672, the right to bring the action (in the ordinary sense of the phrase) would not have accrued until 1837, when the lease expired,—but (as observed in the judgment) the effect of s. 9 in that case was, that the right to bring the action in 1837 was (for the purpose of reckoning the statutory period of limitation) deemed to have first accrued in 1784, when the rent was first received wrongfully, and was barred (subject to the effect of s. 15) by the lapse of twenty years in 1804, thirty-three

years before the time for bringing such action had arrived. That seemingly paradoxical result, however, flowed from the laches of those under whom the plaintiff claimed, in not asserting their right to the rent.

Mortgagor and
Mortgagee.

Mortgagor and Mortgagee.

The case of *mortgagor* and *mortgagee* involves some difficulty. S. 28 had indeed provided that, where the *mortgagee* had taken possession, the *mortgagor* should be barred after twenty years, unless such an acknowledgment had been given as is there specified. That section was repealed by the Act of 1874, being re-enacted by s. 7 with the substitution of "twelve" for "twenty" years.

Mortgagee in
possession.

S. 7 provides that, "when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, *unless, in the mean time*, an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him; and in such case, no such action or suit shall be brought, but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or

37 & 38 Vict.
c. 57, s. 7.

Mortgagor
barred at end
of 12 years.

Acknowledg-
ment;

where several
mortgagors :

where several
mortgagees.

Mortgagee in possession.

estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money, as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage." See *Browne v. Bishop of Cork*, 1 Dru. & Walsh, 700; *Hyde v. Dallaway*, 2 Hare, 528; *Trulock v. Roby*, 12 Sim. 402; *Lucas v. Dennison*, 13 Id. 584; *Batchelor v. Middleton*, 6 Hare, 75; *Stansfield v. Hobson*, 16 Beav. 236, 3 De G. M. & G. 620.

Acknowledgment, when it must be given.

In *Stansfield v. Hobson*, it would seem to have been held that the acknowledgment need *not* be within the statutory period after the mortgagee obtains possession; but in *Re Alison*, 11 Ch. D. 284, and *Sanders v. Sanders*, 19 Id. 373, the contrary was decided by the C. A.; see also *Markwick v. Hardingham*, 15 Id. 339, where it was held by the C. A. that an acknowledgment to a mortgagor after his bankruptcy was insufficient; and *Kibble v. Fairthorne*, (1895) 1 Ch. 219.

Acknowledgment by one of mortgagees where trustees

In *Richardson v. Younge*, 6 Ch. 478, it was held, affirming the decision of Malins, V.-C., that where mortgagees were trustees and shown to be such on the face of the mortgage deed, an acknowledgment by one of them had no effect. Mellish, L.J., said: "It appears to me to be the best construction of this involved and difficult section to hold that the provisions as to acknowledgment by some of several mortgagees apply only where they have separate interests either in the money or the land. In the present case I do not think that Mr. Wilson had any separate interest either in the money or the land. He was simply joint tenant with his co-trustee of the land, and jointly entitled with him to the mortgage-money. Had the mortgagees not been trustees, the case would have stood very differently, for they must almost of necessity have been entitled to some distinct

interests in the mortgage-money, and if they had been partners difficult questions might have arisen; but in the present case, which is simply that of trustees, I agree with the conclusion of the Vice-Chancellor."

Mortgagor and mortgagee.

In *Pendleton v. Rooth*, 1 Giff. 35, a mortgagee in fee, in possession for more than twenty years, had devised the estate to his son in tail, with limitations over, and it was held that an acknowledgment, by the tenant in tail, of the mortgage title restored the right of redemption so as to bind the remainderman, and that a purchase of the equity of redemption by him, and conveyance of it to him in fee, gave him an absolute right to the estate to the exclusion of the devisees in remainder under the will of the mortgagee.

Acknowledgment by tenant in tail holding under devise in tail by mortgagee binds remainderman.

See further as to acknowledgments under s. 28, *Hodde v. Healey*, Mad. & Geld. 181; *Trulock v. Roby*, 12 Sim. 402; *Thompson v. Bowyer*, 9 Jur. N. S. 863; *Lucas v. Dennison*, 13 Sim. 584; *Baker v. Wetton*, 14 Sim. 426. As to acknowledgments under s. 14, see *post*, p. 690.

In *Alderson v. White*, 2 De G. & J. 97, Lord Cranworth said: "I am disposed to think that the statute (of Limitations) cannot apply so as to make the mere possession by the mortgagee for twenty years without acknowledgment a bar to redemption, where the original contract is in terms that the mortgagor may redeem at any time during a period extending beyond the twenty years."

Mortgage giving right to redeem after 20 years.

In *Forster v. Patterson*, 17 Ch. D. 132, it was held by Bacon, V.-C., that the provisions as to disabilities do not operate to protect a mortgagor under this section; and *Kinsman v. Rouse*, Id. 104, was a similar decision by Jessel, M.R.

Provisions as to disabilities do not apply.

If the mortgagee has been in possession of *part* of the land for the statutory period, the right of the mortgagor to redeem that part is barred, though he has held possession of the rest of the land; *Kinsman v. Rouse*, *supra*.

Possession of part by mortgagee.

As to what is a mortgage within this section, see *Locking v. Parker*, 8 Ch. 30; *Chapman v. Corpe*, 41 L. T. 22; and *Re Alison*, 11 Ch. D. 284. See further as to acknowledgments, *post*, p. 690.

But the main difficulty that arose was in the case of a *mortgagor in possession*. His situation will be found discussed, independently of this statute, in the notes to *Keech v. Hall*, vol. i. pp. 502 *et seq.*; but the considerations there adduced were inapplicable to cases under the Act of 1833; that statute having expressly declared in s. 7, that "no

Mortgagor in possession: situation formerly doubtful.

Mortgagor in
possession.

mortgagor or *cestui que trust* shall be deemed to be a *tenant at will*, within the meaning of this clause, to his mortgagee or trustee." Hence it was contended that, at the expiration of twenty years, the right of the mortgagee would be barred by s. 2,—the words of which, it was thought, were perhaps wide enough to include his case; though certainly his case was not within the spirit of them. And in *Doe v. Williams*, 5 A. & E. 291, the judges had expressed considerable doubt as to the true situation of the mortgagor in such a case. "How far," said Patteson, J., "under the third section, it is necessary for the mortgagee to bring his action within twenty years from the day of default, I cannot say. I do not see my way at all. If the third section was intended to comprehend the case of a mortgagee, it is very ill penned."

Question
settled by 7
Wm. 4 & 1
Vict. c. 28,
where interest
paid.

However, the question is now set at rest by an Act of 1837, which (as amended by the Act of 1874, s. 9) enacts that "it shall and may be lawful for any person entitled to or claiming under any mortgage of land, to make an entry, or bring an action at law, or suit in equity, to recover such land at any time within *twelve* years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than *twelve* years may have elapsed since the time at which the right to make such entry, or bring such action or suit in equity, shall have first accrued."

Foreclosure.

A foreclosure action is an "action to recover land;" *Harlock v. Ashberry*, 19 Ch. D. 539.

Payment of
principal or
interest.

By whom.

The payment must be a payment of *principal* or *interest*, and must be made by or on behalf of a person *liable* to pay principal or interest; *Harlock v. Ashberry*, 19 Ch. D. 539; *Newbould v. Smith*, 33 Id. 127; see *Ames v. Mannering*, 26 Beav. 583; *Lewin v. Wilson*, 11 App. Cas. 639. Therefore, a payment of rent to the mortgagee by a tenant of the mortgagor after notice from the mortgagee is not sufficient; *Harlock v. Ashberry*, *supra*. See *Chinnery v. Evans*, 11 H. L. C. 115.

Where no inte-
rest paid.

Where no interest has been paid, the twelve years run from the execution of the deed, if the mortgagee has a right under it to immediate possession; *Doe v. Lightfoot*, 8 M. & W. 553, 564. See note to *Keech v. Hall*, vol. i. p. 514.

Mortgagee
may recover
though mort-
gagor barred.

A mortgagee is, under this Act, protected as against a person who, having been let into possession as tenant at will more than *thirteen* years before action brought, but less than *twelve* years before the mortgage, has gained a title as

against the mortgagors, under s. 7 of the Act of 1833; *Doe v. Eyre*, 17 Q. B. 366; *Ford v. Ager*, 2 H. & C. 279. And a purchaser by a conveyance from a mortgagor and mortgagee is within the protection of the Act as "claiming under a mortgage." *Doe v. Massey*, 17 Q. B. 373.

Mortgagor in possession.

"Claiming under mortgage."

The construction of the Act of 1837 was considered by the Irish Court of C. P. in *Eyre v. Walsh*, 10 Ir. C. L. R. 346, and it was held that the object of the Act is not to give to mortgagees a right of re-entry where none existed previously by the Act of 1833, but that the meaning of the later Act is merely that nothing in the earlier Act shall have the effect of preventing a mortgagee from entering whose interest has been regularly paid; and see *per* Lord Selborne in *Heath v. Pugh*, 6 Q. B. D. 345, 362. In that case the H. L., affirming the decision of the C. A., held that the effect of a foreclosure decree is to give the mortgagee a new title, and therefore a new period of twelve years before he would be barred by the statute; *Pugh v. Heath*, 7 App. Cas. 235. See the section also discussed in *Harlock v. Ashberry*, 19 Ch. D. 539.

Object of the Act of 1837.

Where a mortgage had been paid off, but no reconveyance executed to the mortgagor, it was held that the mortgagor in possession became tenant at will, notwithstanding the proviso to s. 7 of the Act of 1833 (*ante*, p. 663), and that after thirteen years from that time the legal estate of the mortgagee became extinguished under s. 34; *Sands to Thompson*, 22 Ch. D. 614.

Mortgage paid off, but no reconveyance.

In *Murphy v. Sterne*, 1 Dru. & Walsh, 236, Lord Plunket held that a mortgagee who had been brought before the court as a defendant, was not barred by the lapse of twenty years and the provisions of the Act of 1833.

Trustee and cestui que trust.

This head subdivides itself into four cases: for the trust may be either *express* or *implied*, and either the *trustee* or *cestui que trust* may be in possession.

When the *cestui que trust* is in possession in a case of *express trust*, it certainly appears extremely difficult to say that his possession shall, even at law, bar the trustee, with whose right it is perfectly consistent. The trust must in such case have been created either by an instrument *inter vivos*, or a testamentary interest.

Express trust, and *cestui que trust* in possession.

Now, supposing it to be created by an instrument *inter vivos*, the trustee, if barred by the third section, would be so,

Where trust created by

Trustee and
cestui que
trust.

instrument
inter vivos.

at least in the majority of cases, by the 3rd branch of it, which enacts that "when the person claiming such land or rent shall claim in respect of an estate or interest *in possession*, granted, appointed, or otherwise assured by any instrument (other than a will) to him or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or in the receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt: then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument."

Difficulty in
applying s. 3.

Now, upon this clause, there would be difficulty in saying, in the case of a bare naked trust, that the trustee is entitled to the possession at all by virtue of the instrument creating the trust, which manifestly contemplates that the *cestui que trust* shall have the possession; and there would be as great difficulty in saying "that no person entitled under such instrument has been in possession or receipt," when it is manifest that the *cestui que trust*, whose only title is under the instrument, has been so. See *Keene v. Deardon*, 8 East, 248; *Smith v. King*, 16 Id. 283, and the reasoning of Lord Langdale in *Burrell v. Egremont*, 7 Beav. 205; but see *per Patteson, J., Doe v. Phillips*, 10 Q. B. 130. It might be indeed that, by the words *such possession or receipt*, the legislature meant such possession as the trustee would have, that is, in respect of a legal estate; still it would be too hard to put this construction on the clause to the detriment of any other persons entitled under the trust.

Perhaps this
is a *casus*
omissus;

or governed by
s. 2, without
explanation in
s. 3.

It may be that this case is a *casus omissus* altogether unprovided for by the Act; a construction from which no mischief could arise, since the instrument creating the express trust would always explain the nature of the possession; or it may be that the general provision of s. 2 applies, but none of the explanatory provisions of s. 3; and that the trustee will be barred in twenty years (now twelve) after the right to make his entry or bring his action has accrued; but the time of the accrual of such right, not being pointed out by s. 3, is to be ascertained by considerations independent of that section.

There may be
a *casus*
omissus.

That there may be such a *casus omissus* is clear from *James v. Salter*, see *post*, p. 697; and see *Owen v. De Beauvoir*, 16 M. & W. 566, *per cur.*; and *Garrard v. Tuck*, *infra*.

Observations very similar to the above apply where the express trust is created by a will. The 2nd branch of s. 3 enacts that the right of a person who "shall claim the estate or interest of some deceased person who shall have continued in possession or receipt *in respect of the same estate* or interest until the time of his death, and shall have been the last person entitled to *such estate or interest* who shall have been in such possession or receipt," shall "be deemed to have first accrued at the time of such death." (See, *ante*, p. 642.)

Trustee and
cestui que
trust.

Where trust
created by
will.

Supposing that, in the case of an express trust created by writing *inter vivos*, the possession of the *cestui que trust* cannot be held adverse to his trustee, it would be strange indeed if it were held so merely because the trust was created by will; and probably, therefore, any arguments applicable to the former case would be held to apply also with considerable force to the latter. Indeed, it may be doubted whether the deviser who created the trust, and who enjoyed the whole estate *beneficially*, can be said ever to have been entitled to "*such*," or to have possessed "*the same estate or interest*" as the trustee takes; and, therefore, whether this case be not also a *casus omissus* unprovided for by enactment.

Similar diffi-
culties.

It may be worth while to consider the bearing of s. 7 upon these questions. S. 7 provides for the case of a tenant at will, and directs that the landlord's right shall be deemed to accrue against him either at the expiration of the tenancy, or at the end of the year after its commencement, which shall first happen; but it also provides "that no mortgagor, or *cestui que trust*, shall be deemed to be a tenant at will *within the meaning of this clause* to his mortgagee or trustee." See *ante*, p. 663. Now it is obvious that, for all purposes *not within the meaning of this clause*, the *cestui que trust* continues tenant at will to his trustee, provided that he would have been so before the statute; and the only purpose "within the meaning of the clause" is that of making the time of limitation run from the end of the first year.

Bearing of s. 7
on case of
trustees.

There is, therefore, some ground for contending that the possession of a *cestui que trust* cannot now bar his trustee where it would not have done so previous to the statute, for that, before the statute, he was in most cases tenant at will and his possession not adverse, and that the statute has made no difference, for that the provisions of s. 7 are inapplicable, and that, indeed, that section having defined the time at which the right of entry is to accrue in other cases

Perhaps
statute does
not bar
trustee.

Trustee and
cestui que
trust.

of tenancy at will, and having left it undefined at this, the intent of the legislature must be taken to have been to leave this case as it stood before the statute. But see the judgment of the C. A. in *Magdalen Hospital v. Knotts*, 8 Ch. D. 709, 727, a case, however, which on appeal to the H. L. was supported on grounds different from those relied upon by the C. A.

It may indeed be said that a landlord has always *a right* to enter on his tenant at will, and therefore that the general words of the section are sufficient to comprehend this case. See *James v. Salter*, 3 Bing. N. C. 544, *post*, p. 697. To this, however, it may be answered that he must, at all events, have determined the tenancy before he could bring an ejectment against him; and that though an *actual* entry, or demand, or act of ownership inconsistent with the tenancy would have determined it, still a fictitious one was not sufficient for that purpose: for that, before the passing of the Act, if a landlord had brought an ejectment against his tenant at will, he would have been defeated, unless he had shown that, before the day of the demise, the will had been in some manner determined, and the tenancy put an end to; *Right v. Beard*, 13 East, 210; *Doe v. Jackson*, 1 B. & C. 448.

As in the
analogous case
of mortgagor
in possession.

This mode of reasoning is somewhat countenanced by the expressions of the judges in *Doe v. Williams*, 5 A. & E. 291. In that case the ejectment was by a mortgagee against a *mortgagor* in possession, and the judges seem to have doubted whether it could be held to fall within the Act at all; see also *per* Lord Selborne, in *Heath v. Pugh*, 6 Q. B. D. 345, 363. Now, the case of a mortgagor in possession was not so strong as that of *cestui que trust* in possession; since the former may be fairly contended to be, after default, a tenant at sufferance, whereas a *cestui que trust* is almost always tenant at will. The former case, indeed, is now provided for by the Act of 1837 (*ante*, p. 678); but the latter remains untouched by that Act.

When *cestui*
que trust
tenant at will
to trustee.

If it should, in consequence of the above considerations, become necessary to inquire on what principles, previous to the Act of 1833, a *cestui que trust* filled the character of tenant at will to his trustee, that question will be found ably treated by Morley and Coote in their note to *Watkins on Conveyancing*, 6th ed., p. 16; and see Littleton, ss. 462, 463, 464.

Where *cestui*

The above observations apply of course only to cases

where the *cestui que trust*'s possession is consistent with the trust. Where it is inconsistent, no question, I apprehend, can arise, since no tenancy at will could have been implied even before the statute, and the trustee would be barred either under s. 2 of the Act of 1833 (now s. 1 of the Act of 1874), or under the statute of James I., independently of the Act of 1833, provided the bar was before the repeal of the statute of James by the Stat. Law Rev. Act, 1863; see *Burroughs v. McCreight*, 1 Jones & L. 290.

Trustee and
cestui que
trust.

que trust's pos-
session incon-
sistent with
trust, trustee
barred.

The case of *Doe v. Phillips*, 10 Q. B. 130, upon the subject here discussed, was thought by some to have decided that the possession of the *cestui que trust* for twenty years without acknowledgment, will bar the right of the trustee, under ss. 2 and 3 of the statute; it is, however, submitted that the decision when examined does not necessarily involve that proposition. The facts of the case are thus stated in the report:—The plaintiff claimed the premises which were the subject of the action, under limited letters of administration, granted to him on the 14th August, 1843, of the goods, chattels, and effects of one Holyhead, deceased, to whom a satisfied term of 500 years in the premises in question had been assigned in 1767, upon trust to attend the inheritance, the beneficial interest being vested in certain minors, on whose behalf the plaintiff brought the action. It was held he could not recover.

Semble, that
Doe v. Phillips
does not
decide that
trustee barred
by ss. 2 and 3.

Now, it will be observed, it is not stated that the *cestui que trust* was the *party in possession*, whilst the statement that the action was brought on behalf of the persons beneficially interested would rather seem to show the contrary; and, although the argument seems to have proceeded on the assumption that the possession was that of the *cestui que trust* (as the effect of a tenancy at will and its determination formed the chief subject of contest, which could scarcely have been in question if any other than the *cestui que trust* had been in possession), still it was conceded on all sides that there had been no demand of possession; and the view taken by the court seems to have been, either that no tenancy at will had ever existed under the circumstances, in which case ss. 2 and 3 of the statute would be a bar, or if a tenancy at will was created it had not been determined,—the bringing of the action alone, without a previous demand of possession, not being sufficient for that purpose.

In *Doe v.*
Phillips,
tenancy did
not exist or
determine.

Whilst, therefore, there are observations of the judges in the above case, which render it questionable whether they

Trustee and
cestui que
trust.

In *Garrard v.*
Tuck s. 3 held
not to apply.

Cestui que
trust tenant at
will, and right
accrues only
on determina-
tion of will.

But only
where *cestui*
que trust
actual
occupant.

Case of
implied trust.

Whether s. 7
applies to im-
plied trust.

considered the case of trustee and *cestui que trust* to be excluded from the operation of s. 3 of the statute, yet it is submitted that the court never intended to decide, nor in fact decided, that the mere possession of the *cestui que trust* for twenty years will bar the right of the trustee, and upon the case being afterwards cited in *Garrard v. Tuck*, 8 C. B. 231, 253, Wilde, C.J., in delivering the judgment of the court, observed: "The facts of that case (*Doe v. Phillips*) are not given in detail; so that it does not appear whether the *cestui que trust* in that case had been in possession of the lands within twenty years, or indeed that they had ever been in possession. In the absence of more information than we possess regarding that case, we do not look upon it as binding us." And, accordingly, in *Garrard v. Tuck*, it was expressly decided that s. 3 of the statute *did not* apply to the case of a *cestui que trust* holding the possession of lands under the trustee, "the general object of the statute" being "to settle the right of persons adversely litigating with each other; not to deal with cases like that of trustee and *cestui que trust* where, though there are two parties, there is but one single interest—that of the person beneficially entitled;" 8 C. B. 250.

The court, therefore, held that a *cestui que trust* who is let into possession of the trust estate by the trustee becomes his tenant at will, and the right of entry under s. 2 of the Act of 1833 (now s. 1 of the Act of 1874) accrues only on the determination of such tenancy at will. The case of *Garrard v. Tuck* was followed with approval in *Drummond v. Sant*, L. R. 6 Q. B. 763.

But this doctrine only applies where the *cestui que trust* is the *actual occupant*. Where therefore a plaintiff had been let into possession of the trust estate by the *cestui que trust*, and retained it for more than twenty years without payment of rent to, or acknowledgment of title in, any one, it was held he could recover in ejectment against the heir-at-law of the trustee, who had turned him out of possession; *Melling v. Leak*, 16 C. B. 652.

To cases in which the *cestui que trust* is in possession under an *implied trust*, the observations on the wording of s. 3 will for the most part prove inapplicable. But those upon the provisions of ss. 2 and 7 will apply.

Patteson, J., however, with the assent of Cresswell, J., has since the above was written, ruled at *nisi prius* that the proviso in s. 7 only applies to *express* trusts, an opinion in

which the Court of C. P. seem to have coincided; see *Doe v. Rock*, Car. & M. 549, 4 M. & Gr. 30. The point does not, however, seem to have been much discussed, and perhaps did not very clearly arise. This case was commented upon in *Drummond v. Sant*, *supra*, where the proviso was held to apply in the case of an occupation under articles of agreement for a lease for 99 years as an actual and direct trust.

Trustee and
cestui que
trust.

The decision in *Drummond v. Sant* was approved and followed by the C. A. in a similar case, *Warren v. Murray*, (1894) 2 Q. B. 648, where it was laid down that a legal right of entry, which is not effective by reason of the occupier having an equitable right to the possession, is not affected by the statute during the continuance of the equitable right; and Kay, L.J., expressly held that the proviso to s. 7 includes the case of an implied trust.

To put an instance or two of *implied trust*:—A. purchases land with his own money, and takes the conveyance in the name of B., a stranger, who thereupon becomes, by implication, a trustee for A; *Anon.*, 2 Vent. 361; *Riddle v. Emerson*, 1 Vern. 108; *Lamplugh v. Lamplugh*, 1 P. Wms. 111. A. enters into possession; he was certainly before the Act tenant at will to B., and the proviso at the end of s. 7 (save *quatenus* the purpose of that section) leaves him so.

Instances of
implied trusts.

Again: A. enters into a contract to purchase land from B., who thereupon becomes, by implication, a trustee for A.'s benefit; *Ripley v. Waterworth*, 7 Ves. 425. A. enters, and, before the statute, was tenant at will to B.; and the proviso at the end of s. 7 (except so far as the purpose of that section extends) seems to leave him so.

Now, in these cases of implied trust, also, if the *cestui que trust* be indeed a tenant at will (and if the case can be considered as omitted from the proviso in s. 7), the question is, whether some determination of the will must not take place before the trustee's right accrues within the meaning of s. 2. The right to enter, mentioned in that section, is nowhere defined, save in those subsequent sections within which the present case does not fall. Must it not, then, in other cases, mean what it meant before the Act of 1833, namely, a right to bring ejectment? and if so, are not *Right v. Beard* and *Doe v. Jackson* (*ante*, p. 682) applicable?

If *cestui que*
trust tenant at
will, must not
the will be
determined
before right
accrues?

Assuming, however, that the opinion of Patteson and Cresswell, JJ., in *Doe v. Rock*, was correct, the case of a *cestui que trust in possession* under an implied trust would

Trustee and
cestui que
trust.

Doe v. Rock.
Dictum that
implied trust
not within
proviso at end
of s. 7, un-
necessary to
decision.

fall within the early part of s. 7, and be governed by the same principles as that of an ordinary tenant at will.

The case of *Doe v. Rock*, 4 M. & Gr. 30, was as follows :— W. agreed to purchase a plot of ground from F. & S. He took possession of it, and afterwards assigned his equitable right to B., who allowed him to remain in possession till his death. He devised all his property to his widow, who occupied till her death, and devised her property to persons, against one of whom the representative of B., having obtained a conveyance of the legal estate, brought an ejectment more than twenty years after the death of W. There was no proof of payment of rent by W.; there was some evidence of an acknowledgment by his widow, but the jury found that she did not become tenant to F. & S. It was held that the plaintiff was barred. It certainly was laid down in that case that an implied trust did not fall within the proviso at the end of s. 7. It does not, however, seem to have been a question necessarily involved in the case; for although F. & S. were at first seised in trust for W., they ceased to be so on the assignment of the equitable right to B., and more than twenty years had elapsed after that event before the commencement of the action, during which twenty years W. and his widow were in possession, but not as *cestui que trusts*.

Trustee in
possession.

S. 25.

Cestui que
trust barred
only against
purchaser for
valuable con-
sideration.

Next, as to the case *where the trustee is in possession*.

It is provided by s. 25 of the Act that “when any land or rent shall be vested in a trustee upon any *express trust*,” the right of the *cestui que trust*, or any person claiming through him, to sue the trustee, or any one claiming through him, to recover the land or rent, is to be deemed to have first accrued at the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration, and is then to be deemed to have accrued only as against the purchaser, and anyone claiming through him; and by s. 24, that no person claiming any land or rent in equity shall bring any suit to recover the same after the time during which he might have made an entry or distress, or brought an action to recover the same, *if he had been entitled at law*.

S. 24. Right
to sue in
equity to be
same as at law.

*Magdalen Col-
lege v. Attor-
ney-General.*

In *Magdalen College v. Attorney-General*, 6 H. L. C., 189, the effect of these sections was considered. The facts were shortly as follows :—Lands belonging to two parishes had been placed by a statute under the management of the rectors and churchwardens, who, with the consent of the vestries, were empowered to grant leases. In 1790 the

rectors and churchwardens, carrying out an arrangement, the fairness of which was not at the time in any way objected to, leased the lands to Magdalen College for ever, subject to a fixed rent-charge. The leases were enrolled, and the college was built on, and improved, the demised property. In 1852 an information was filed by the attorney-general on behalf of the inhabitants of the two parishes, praying that the leases might be cancelled. The H. L., however, upheld the leases, being of opinion that the poor of the two parishes must be deemed to be the real plaintiffs (the attorney-general having no independent rights in the matter), and that they were in the situation of *cestui que trusts*: that s. 24 of the statute applied to such a suit, and barred the equitable remedy against the college, who were purchasers for value, although s. 25 might save the rights of the *cestui que trusts* against those standing to them in the position of trustees. See also Sugden, V. & P. (13th ed.) 402, and his Handy Book of Real Property Law (7th ed.) 217.

Trustee and
cestui que
trust.

The Judicature Act, 1873, provides, by s. 25 (2), that no claim of a *cestui que trust* against his trustee for any property held upon an express trust shall be held to be barred by any Statute of Limitations.

It will be observed that, to bring a case within s. 25 of the Act of 1833, there must be *land*, a *trustee* in whom the land is vested, a *cestui que trust* for whom the land is to be held, and an *express trust*. An *express trust* is one which arises upon the construction of the instrument by which it is created, and does not rest upon any inference of law imposing a trust upon the conscience; *Cunningham v. Foot*, 3 App. Cas. 974, 984, *per* Lord Cairns; *Petre v. Petre*, 1 Drew, 371; *Charity Commissioners v. Wybrants*, 2 Jones & L. 182; *Law v. Bagwell*, 4 Dru. & War. 398; *Salter v. Cavanagh*, 1 Dru. & Walsh, 668; *Dawkins v. Penrhyn*, 4 App. Cas. 51; *Drummond v. Sant*, L. R., 6 Q. B. 763; *Locking v. Parker*, 8 Ch. 30; *Yardley v. Holland*, 20 Eq. 428; *Sands to Thompson*, 22 Ch. D. 614; *Patrick v. Simpson*, 24 Q. B. D. 128.

In *Churcher v. Martin*, 42 Ch. D. 312, land was conveyed to trustees upon charitable trusts by a deed which was void under the Mortmain Act; the trustees took possession and remained in possession for more than twelve years, and Kekewich, J., held that persons claiming under the grantor were barred by the Statute.

S. 8 of the Act of 1874 (which substantially re-enacts the

S. 8 of 37 & 38
Vict. c. 57.

Trustee and
cestui que
trust.

As to charges
on land.

repealed s. 40 of the Act of 1833), provides that "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given." In this section the word "judgment" refers to judgments generally, and not merely to judgments which are charges upon land; *Hebblethwaite v. Peever*, (1892) 1 Q. B. 124; *Jay v. Johnstone*, (1893) 1 Q. B. 189. See, as to charges on land, *Chinnery v. Evans*, 11 H. L. C. 115; *Lawton v. Ford*, 2 Eq. 97; *Re Stephens*, 43 Ch. D. 39; *Re England*, (1895) 2 Ch. 100, 820; *Kibble v. Fairthorne*, (1895) 1 Ch. 219; as to legacies, *Binns v. Nichols*, 2 Eq. 256; *Re Davis*, (1891) 3 Ch. 119; *Re Barker*, (1892) 2 Ch. 491; *Re Owen*, (1894) 3 Ch. 220; and, as to payment of interest, *Topham v. Booth*, 35 Ch. D. 607; *Re Frisby*, 43 Id. 106.

Burrowes v.
Gore.

Trust of charge
on land same
as trust on
land.

Burrowes v. Gore, 6 H. L. C. 907, is an important decision upon ss. 40 and 25 of the Act of 1833. In this case the question arose as to whether a trust of a charge upon land ought to be dealt with, so far as relates to the statute, in the same way as if it had been a trust with regard to the land itself. The H. L. was of opinion that an express trust of a charge upon land was, according to the true construction of the Act, as much saved from its operation by s. 25 as an express trust of the land itself. "The statute of limitations," said Lord St. Leonards (p. 961), "is very singularly framed with regard to matters of this nature, for in the earlier sections it only provides for trusts which affect the land or rent. But take land only; it bars the claim to land. But when you come to s. 40, and so on, as to charges upon land, you have then no corresponding section with regard to trusts as to such charges. . . . There is always a difficulty in applying the statute when you

come to trusts, not with regard to land itself, but with regard to charges upon land; but, however, I consider it perfectly settled, and rightly settled, that the construction is the same as to charges in either case. The old rule prevails: I think it is perfectly settled that the effect of a charge of this nature, to be raised by express trust, falls within the saving as much as if the express trust had been applied, not to charges upon the land, but to the land itself." In this case, however, Lord Wensleydale differed from the other lords, thinking that, on the facts of the case, no trust of such a nature as to prevent the operation of the statute of limitations could be deemed to exist.

Trustee and
cestui que
trust.

Bys. 10 of the Act of 1874, however, the above rule is altered. That section provides that "after the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust." See, as to arrears of interest, *Snow v. Booth*, 8 De G. M. & G. 69; *Bolding v. Lane*, 1 De G. J. & S. 122; *Edmunds v. Waugh*, 1 Eq. 418; *Bowyer v. Woodman*, 3 Id. 313; *Re Stead*, 2 Ch. D. 713; *Smith v. Hill*, 9 Id. 143; *Cunningham v. Foot*, 3 App. Cas. 974.

Above rule
altered by 37
& 38 Vict.
c. 57, s. 10.

By s. 26 of the Act of 1833, in cases of *concealed fraud*, the right of the *cestui que trust* is to be deemed to have first accrued at the time at which such fraud shall, or with reasonable diligence might, have been first known; but no owner of lands or rents can, under this provision, have a suit in equity for the recovery of them, or for setting aside any conveyance of them, on account of fraud, against any *bonâ fide* purchaser for valuable consideration who has not assisted in the commission of the fraud, and, who at the time when he made the purchase, did not know and had no reason to believe that any such fraud had been committed. See *Lewis v. Thomas*, 3 Hare, 26; *Sturgis v. Morse*, 24 Beav. 541; *Manby v. Bewicke*, 3 K. & J. 342; *Chetham v. Hoare*, 9 Eq. 571; *Vane v. Vane*, 8 Ch. 383; Sugd. Vend. & Pur. (13th ed.) 402; *Rains v. Buxton*, 14 Ch. D. 537; *Willis v. Howe*, (1893) 2 Ch. 545.

S. 26. Con-
cealed fraud.

See, also, as to the application of the Act in equity in

Application of
Act in equity.

Trustee and
cestui que
trust.

cases of trust and analogous cases, *Re Scott*, 8 Ir. Ch. Rep. 316; *Knight v. Bowyer*, 2 De G. & J. 421; *Sturgis v. Morse*, 3 Id. 1; *Gyles v. Gyles*, 9 Ir. Ch. Rep. 135; *Moore v. Petchell*, 22 Beav. 172; the judgment of Napier, L.C., in *Malone v. O'Connor*, 9 Ir. Ch. Rep. 459; *Lewis v. Duncombe*, 30 L. J. Ch. 732; *Dickinson v. Teasdale*, 32 Id. 37; *Proud v. Proud*, Id. 125; *Mason v. Broadbent*, 33 Beav. 296; *Mills v. Borthwick*, 35 L. J. Ch. 31; *Knox v. Gye*, L. R. 5 H. L. 656.

Possession of
trustee not ad-
verse in equity
to *cestui que*
trust.

The possession of trustees having the legal title cannot be, in equity, adverse to their true *cestuis que trust*; and the fact that for upwards of the statutory period they have treated the land as belonging to another person than the *cestuis que trust* does not operate as a bar under the statute; *Lister v. Pickford*, 34 L. J. Ch. 582.

S. 24.

S. 24 only bars equitable rights so far as they would have been barred had they been legal rights; *Archbold v. Scully*, 9 H. L. C. 360. See also, as to this section, *Pugh v. Heath*, 7 App. Cas. 235.

Exceptions
contained in
the statute.

Having made a few observations on the applicability of the general enactments of the statute to the cases of persons occupying particular characters, it seems right to say a few words upon those cases in which their operation is excluded by some provision contained in the statute itself; though it may be premised that mere ignorance of his rights on the part of the person barred, does not prevent the operation of the statute; *Dawkins v. Penrhyn*, 6 Ch. D. 318; *Rains v. Buxton*, 14 Id. 537.

Ignorance no
answer to the
statute.

Where
acknowledg-
ment in writ-
ing: s. 14.

The first of these cases is *where an acknowledgment in writing has been given* under s. 14, which enacts that, "when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to *have first accrued* at and not before the time at which such acknowledgment or

the last of such acknowledgments, if more than one, was given."

Whether a particular writing amount to an acknowledgment within the meaning of this section is a question for the judge, not for the jury; *Doe v. Edmonds*, 6 M. & W. 295, where Coleridge, J., thought at *nisi prius*, and his opinion was afterwards confirmed by the Court of Exch., that an offer to take a lease of the premises, made by a person who at the same time stated that he was of opinion he could himself establish a legal title to them, was not, if not accepted, an acknowledgment within the meaning of this section. And see *Hobson v. Burns*, 13 Ir. L. R. 286; *Morrell v. Frith*, 3 M. & W. 402. In *Fursdon v. Clogg*, 10 M. & W. 572, the defendant, in answer to an application by the plaintiff's attorney for rent, after stating "that he was involved in law from 1805 to 1816 concerning the land, which had given him great trouble and expense, and with respect to the expense it was reasonable that the lords of the fee should make him some recompense accordingly," and that "it appeared reasonable that the plaintiff should vindicate his right to the land," said that the writer begged "compassion, mercy, pity and recompense in a satisfactory manner." This was held a sufficient acknowledgment; and see *Incorporated Society v. Richards*, 1 Dru. & War. 258, 291; *Hill v. Stawell*, 2 Ir. L. R. 302; and *Dublin Corporation v. Judge*, 11 Id. 8, where it was held that an unaccepted proposal for a lease signed by a third person by the desire and in the presence of the defendant who was unable to write was sufficient; *Goode v. Job*, 1 E. & E. 6; *Ley v. Peter*, 4 H. & N. 101; *Jayne v. Hughes*, 10 Exch. 430.

The acknowledgment must be given before the statutory period has expired; *Markwick v. Hardingham*, 15 Ch. D. 339; *Sanders v. Sanders*, 19 Id. 373; *Kibble v. Fairthorne*, (1895) 1 Ch. 219.

S. 15 enacts that "when no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any

Cases excluded from operation of statute.

Whether a writing be an acknowledgment, question for judge. Instances.

Must be given within statutory period.

S. 15. Where possession non-adverse at passing of Act, five years allowed.

Cases excluded from operation of statute.

time *within five years* next after the passing of this Act." The Q. B. held the effect of this section to be to render a devise made by such person within the five years valid; *Culley v. Doe*, 11 A. & E. 1008. The word "interest" is used in this section by mistake for "rent," which does not mean rent reserved on a lease; *Doe v. Angell*, 9 Q. B. 328, where the receipt of the rent, being a rent-service and therefore not within the statute, was held not to be adverse; see this case, *ante*, p. 672; see also *Incorporated Society v. Richards*, 1 Dru. & War. 258, 289.

Pleading.

It has been laid down, in an action of replevin, that to bring a case within s. 15, the absence of an *acknowledgment* ought to be pleaded; *James v. Salter*, 2 B. N. C. 505, 513; and see the pleadings on that section in *Newlands v. Holmes*, 3 Q. B. 679, 682.

S. 16.
Period allowed after ceasing of disability.

S. 3 of 37 & 38
Vict. c. 57.

Other exceptions were contained in s. 16 of the Act of 1833. That section is repealed by the Act of 1874, and replaced by s. 3 of the later Act, which enacts that, "if at the time at which the right of any person to make an entry or distress or bring any action or suit to recover any land or rent shall have first accrued as aforesaid such person shall have been under any of the disabilities hereinafter mentioned (that is to say), infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years or six years (as the case may be) hereinbefore limited shall have expired, make an entry or distress or bring an action or suit to recover such land or rent at any time *within six years* next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability or shall have died (whichever of these two events shall have first happened)." See *Goodall v. Skerratt*, *ante*, p. 661. By this section, the period of limitation was shortened; and s. 4 of the Act of 1874 provides that absence beyond the seas shall no longer be a disability.

In *Borrows v. Ellison*, L. R. 6 Ex. 128, it was held that successive overlapping disabilities had the same effect as a continuous disability in preventing the statute from running.

The disability sections do not apply to cases under s. 28 of the Act of 1833 (now s. 7 of the Act of 1874); see *ante*, p. 677.

The provisions of s. 16 of the Act of 1833 were qualified by ss. 17, 18, and 19.

S. 5 of the Act of 1874 is now substituted for s. 17 of the Act of 1833, and enacts that “no entry, distress, action, or suit shall be made or brought by any person who, at the time at which his right to make any entry or distress or to bring an action or suit to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but *within thirty years* next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.” By the later Act the periods of *thirty* and *six* years, are substituted for *forty* and *ten* years in the earlier Act.

Cases excluded from operation of statute.

S. 5 of 37 & 38 Vict. c. 57.

S. 18 of the Act of 1833 enacts that, “when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent *beyond the said period of [twelve] years next after the right of such person to make an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of [six] years next after the time at which such person shall have died,* shall be allowed by reason of any disability of any other person.” The Act of 1874 (s. 9), altered the periods to *twelve* and *six* years.

S. 18.

Where person dies under disabilities.

S. 19 of the Act of 1833, relating to absence beyond the seas, was repealed by the Act of 1874 (s. 9).

In *Doe v. Bramston*, 3 A. & E. 63, there is a decision upon these sections. A female devisee in fee married one Corbyn, and after her marriage removed from the premises, and no act of ownership had since been exercised by her, or any person claiming under her. The ejectment was brought more than forty years after the removal, but less than five years after the Act of 1833. The plaintiff was the devisee's heir-at-law. The court held that he was barred by s. 17. There is, however, a consideration which does not seem to have been pressed in *Doe v. Bramston*, and which is not adverted to in the judgment in the case; namely, that *the words of s. 17 are prospective*. They are :

Doe v. Bramston.

Quære, whether s. 17 prospective.

Cases excluded
from operation
of statute.

“no entry, distress, or action shall be made or brought by any person who at the time, &c., *shall be* under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years,” &c. Now, it will be observed, that in s. 16 the words are *retrospective*; namely, “if at the time at which the right, &c., shall have first accrued, &c., such person *shall have been* under any of the disabilities,” &c. So are the words of the *second*—so are the words of the *third*—so are the words of the *fifteenth* section.—So that the legislature seems to have been alive to the distinction between words *prospective* and *retrospective*; and, as that point was not under the consideration of the court in *Doe v. Bramston*, it will, perhaps, notwithstanding that decision, be still permitted to a party to contend that s. 17 only applies to disabilities subsequent to the Act of 1833. The point, however, was not taken in *Jumpsen v. Pitchers*, 13 Sim. 327. See, as to the effect of the word *shall* in rendering an enactment prospective, *Burn v. Carvalho*, 1 A. & E. 883, 896; and see *Pardo v. Bingham*, 4 Ch. 735.

It may be further observed that there are other sections in this statute in which *prospective* words have been inserted. Thus, in s. 23 there are prospective words, viz.—that when a tenant in tail shall have made an assurance “*which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession,*” &c., “such assurance *shall be and be deemed to have been* effectual,” &c.

The author of this note has been informed that several gentlemen of high professional eminence have expressed their opinion that the above section (notwithstanding that it contains some retrospective words) is *prospective* (see 2 Sugd. V. & P. 11th ed., 633), and that it is or was in contemplation to introduce a bill for the purpose of giving it a retrospective effect. Now, if s. 23 be prospective, it will be difficult to contend that s. 17 is retrospective.

Effect of holding
s. 17 prospective.

The consequence of holding s. 17 prospective would be, that a discontinuance of possession for any length of time previous to the Act of 1833 would not operate or assist in operating as a bar, provided that the person or persons entitled had been during such time under disability. Such a case, it will be perceived, might easily arise even now,

and therefore it is that so much space has been attributed to the discussion of the precise effect of *Doe v. Bramston* on the construction of s. 17. Some other consequences, flowing from that decision, are commented upon by Sir E. Sugden in the above edition of his treatise on Vendors and Purchasers.

Cases excluded
from opera-
tion of statute.

S. 38, preserving in certain cases the right to bring real actions, was repealed by the Stat. Law Rev. Act, 1874 (37 & 38 Vict. c. 35).

S. 38.

The reader will remember that, before the Act of 1833, a right of entry might have been taken away, not only by the lapse of twenty years, bringing the case within the provisions of stat. 21 Jac. 1, c. 16, but also by a descent cast, by a lineal warranty with, or a collateral warranty without, assets, or by a discontinuance. Now, it was possible that in some one of these modes the right of entry might have been gone before the Act of 1833, though less than twenty years might have elapsed since the accrual of the title; and then, that statute having abolished the real actions applicable to such a case, the estate would have been lost by an adverse possession of less than twenty years, had it not been for s. 38, which enacted that, "when, on the said 1st day of June, 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid (*i.e.*, real action), in respect of such land, *such writ or action* may be brought after the said 1st day of June, 1835, but only within the period during which, by virtue of the provisions of this Act, an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away." See *Doe v. Ross*, 7 M. & W. 102; and *Cannon v. Rimington*, 12 C. B. 1, 18. And *quære* if issue in tail claiming against the feoffment of his ancestor, when this operated by way of discontinuance, the ancestor not dying until after the 1st of June, 1835, be within this saving clause? See *supra*, p. 659.

In order to prevent the necessity of extending s. 38 to future cases, s. 39 of the Act of 1833 enacts that, "no descent cast, discontinuance, or warranty which may happen to be made after the said 31st day of December, 1833, shall toll or defeat any right of entry or action for the recovery of land."

S. 39.
Right of entry
not to be
tollled.

The reader will have observed that the remarks made in

Meaning of

word "rent"
in the statute

this note are confined altogether to the cases of *land*, and charges upon land, although the Act contains provisions applicable to other descriptions of property. It was conceived that it would have embarrassed the consideration of the principal subject, and rendered the note (already an overgrown one) much too long, had the application of the statute to those other subject-matters been discussed. It is proper, however, to mention that the *rents* to which s. 2 of the Act of 1833 (now s. 1 of the Act of 1874) applies and the right to recover which is barred, after a lapse of *twelve* years, are not rent-services reserved on leases; *Grant v. Ellis*, 9 M. & W. 113; *Paget v. Foley*, 2 B. N. C. 679, 688; *Dean of Ely v. Cash*, 15 M. & W. 617; *Spratt v. Sherlock*, 3 Ir. C. L. R. 69; and see *Doe v. Angell*, 9 Q. B. 328, and *Irish Land Commission v. Grant*, 10 App. Cas. 14, as to the use of the word "rent" in various sections of this statute. But "rent" does include a quit rent payable in respect of a copyhold tenement; *Howitt v. Harrington*, (1893) 2 Ch. 497. See also *post*, p. 699.

As to heriots

In *Owen v. De Beauvoir*, 16 M. & W. 547, the Court of Exch. was of opinion that, notwithstanding the interpretation clause (s. 1), the word "rent" in s. 3 would not include *heriots*, or other similar rights which become due at uncertain intervals (and see Com. Dig., tit. *Temps.* G. 9), or *rents payable at intervals of more than twenty years*, as the injustice that would otherwise arise would exclude such a construction—or that perhaps such rights are not within the statute at all; and this view was affirmed in *Zouche v. Dalbiac*, L. R. 10 Ex. 172. Whether heriots come within s. 42, *quære*; Id.

"Annuities
or periodical
payments."

In *Payne v. Esdaile*, 13 App. Cas. 613, it appeared that a statute of 37 Hen. 8, c. 12, provided that the inhabitants of the City of London should yearly for ever pay their tithes in respect of their houses after certain rates. No payments had, so far as was known, ever been made in respect of certain houses. In an action by a lay impropriator against the inhabitants of these houses, it was held by the H. L. that these payments imposed by the statute of Hen. 8 were "annuities or periodical payments charged upon land," within the meaning of s. 1 of the Act of 1833, and that the claim was barred.

statute does
not apply to
collateral
covenant.

It may also be observed that the statute does not, as is obvious, apply to an action on a collateral covenant for payment of a rent charged on land, and that the covenantee

may therefore recover damages for the breach of such a covenant, although the right to recover the rent-charge is barred by the Act; *Manning v. Phelps*, 10 Exch. 59.

There is one decision upon the application to *rents* which it is necessary to notice, because of its effect on the construction of ss. 2 and 3 as regarding lands. The case is *James v. Salter*, 2 B. N. C. 505, 3 Id. 544. It was an action of *replevin*. *Avowry*—in respect of a rent-charge devised by J. S. to the defendant, and issuing out of the *locus in quo*. *Second plea in bar*—that the distress was not made within twenty years next after the time at which the right to make a distress first accrued to the defendant. *Traverse, and issue joined*. (The record was in reality more complex; but so far as relates to the present subject, the above was the effect of it.)

*James v.
Salter.*

At the trial, it appeared that the testator died on 1st May, 1805. It was contended that the avowant was barred by s. 2 of the Act of 1833; and the Court of C. P., upon a motion for a new trial, held that he was not so barred. Tindal, C.J., stated the question to be “whether, within the meaning of this Act of Parliament, a party, who has never been in the receipt of an annuity granted more than twenty years before he lays claim to it, may still distrain for the arrears of the last twenty years, or whether the statute operates under such circumstances as an absolute bar to any claim at all.”

His lordship said that, “*if we examine the three different conditions expressed in the third section, this case cannot fall within either, unless it be the last—‘claims in respect of an interest assured by any instrument, other than a will, by a person being in respect of the same interest in receipt of the profits of the land, where no person entitled under the instrument has been in such receipt;’ and from that bequests by will are expressly excepted.*” Bosanquet, J., said that “there might have been a question under the second section, whether the right of action was not barred by the lapse of twenty years, *but the Act does not stop at the second section—it goes on in the third to specify the occasions when a right shall be deemed to have first accrued within twenty years; and as the case does not fall within the three instances specified in that section, we think the annuitant was not barred*”; 2 B. N. C. 513, 515.

The effect of this decision would have been to limit the operation of s. 2 by s. 3; so that every case not provided for by s. 3 would have been taken out of the operation

*James v.
Salter.*

Decision over-
ruled after
second trial.

Effect of third
section upon
second.

of s. 2—that is, out of the operation of the statute altogether.

But this decision was overruled by the same court in *James v. Salter*, 3 B. N. C. 544, which arose on the same state of facts set out, upon a second trial of the same cause, in a special verdict; the court holding on argument, that “the case was governed by the second section of the statute, which, under the facts found in the special verdict, affords a bar to all claim and title to the annuity.

“That the case,” said Tindal, C.J., delivering the judgment of the court, “must have been governed by the second section, if that section had stood alone, cannot be doubted; and, upon a more close examination of the third section, the object and intent of it seem to us to be no more than this—to explain and give a construction to the enactment contained in the second clause as to ‘the time at which the right to make a distress for any rent shall be deemed to have first accrued,’ in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the second section, but is not included among the instances given by the third, to be governed by the operation of the second. . . . Indeed, unless this is held to be the true construction, the case which is likely to occur perhaps with the most frequency, viz.—the *devise of an estate in possession in land*” (the word *particular* has probably been omitted here by the reporter), “or of an estate in possession in a rent-charge first created by the will—would be altogether unprovided for by the statute. For the third class of instances enumerated in section three, describes the grant to be ‘by a person being *in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent*;’ a description which can neither apply to the case of a devise of a particular estate in land, or of a newly-created rent; for the devisor, who has by his will carved an estate in land out of the estate whereof he was seised, can never be said to have been possessed in respect of *the same estate or interest* as that claimed by the devisee; still less can the devisor, who creates a new rent-charge by his will, be said to have been in the receipt of the rent. The case, therefore, under discussion *not falling within the third section, but falling within the clear and unambiguous terms of the second, we hold to be governed thereby*; that the claim and title of the defendant Salter to the annuity is barred by the lapse of twenty years since his right

to distrain first accrued; and that the verdict upon the second issue must be entered for the plaintiff.”

James v. Salter.

Some observations on the effect of this decision will be found in 2 Sugd. V. & P., 11th ed., pp. 617, *et seq.*, where it is remarked that, “if the criticisms of the Common Pleas be correct in regard to the language of the third section, which speaks of *the same estate or interest*, no case, although a grant within that section, and not a will, would fall within it, where a particular estate or a rent was created by it.” Sir Edward Sugden’s own construction of s. 3 was, that such particular estates and rents would have been included in s. 3; and that being derived out of the estate of the deviser or grantor, he might well enough be said to have been in possession in respect of *the same estate or interest*. And certainly it is held that the assignee of *part* of a reversion is an assignee of *the reversion* within the meaning of 32 H. 8, c. 34 (see the notes to *Spencer’s Case*, vol. i., p. 60). But that statute, it must be remembered, uses the word *grantees* as well as *assignees*, and the words “*any reversion of or in the same*” lands. Now, to make it completely analogous to the Act of 1833, the words should be “of the *same* reversion,” not “of *any* reversion;” so that perhaps even an argument against Sir Edward’s construction, and in favour of that of the Common Pleas, is to be found in the presence of words in the stat. of H. 8, which are omitted in the Act of 1833.

Decision discussed.

Practically, as has already been suggested, Sir Edward’s construction and that of the court may possibly be found to produce pretty much the same effect upon the rights of parties. (See *ante*, p. 643.)

The effect of s. 3 of the statute in explaining and controlling s. 2, has been since discussed in the important case of *Owen v. De Beauvoir*, 16 M. & W. 547, affirmed 5 Exch. 166. It was an action of replevin; the defendant was entitled to an ancient quit rent, payable annually at Michaelmas, out of certain lands held of his manor. All the rent which accrued due up to Michaelmas, 1824, was duly paid, the last payment having been made on 15 Jan., 1825. No rent was paid after that date; and on 15th May, 1845, the defendant distrained for six years’ arrears of rent, accrued due up to Michaelmas, 1844. It was held that the defendant’s title to the rent was extinguished by lapse of time. In this case there seemed to be no doubt that, if governed by s. 2 only, the distress would have been in time, as the

Effect of s. 3 on s. 2 discussed in *Owen v. De Beauvoir*.

statute would not have begun to run until Michaelmas, 1825, when a right to make a distress within the terms of that section first accrued; but as the defendant clearly had been in the receipt of the rent, and whilst entitled thereto had discontinued such receipt, the court thought the case came within the exact words of s. 3, and that the right must be deemed to have first accrued *at the last time when the rent was so received*. For the difficulties, and in many cases the hardship, likely to arise from this construction of the statute, the reader is referred to the judgment in the case itself.

Attorney-General v. Persse.

In *A.-G. v. Persse*, 2 Dru. & War. 67, a rent-charge had been devised by will, dated 1812, as a salary for a schoolmaster, to be appointed *by the owner* (under the same will) for the time being of the estate on which the rent was charged for ever. No schoolmaster having been nominated, and an information being filed in 1839, to carry the trusts of the will into execution, it was held that the statute could not begin to run until a schoolmaster was appointed. See also the cases collected in Sugd. V. and P. 13th ed., 402.

Cases not provided for.

It has, however, already been hinted that cases may by possibility occur not falling within s. 3, and in which also the time at which the right shall be deemed to *have first accrued* within the meaning of s. 2 cannot be ascertained without having recourse to the old state of the law: for instance, the case of *cestui que trust* in possession above discussed, which there appears to be difficulty in ranging within the third or any subsequent section, and also difficulty in bringing within any analogy furnished by those sections and indicative of the time at which s. 2 is to begin to operate upon it: inasmuch, as, by that section, the time of limitation begins to run *when the right first accrues*, and there may be a difficulty in holding the right of a landlord against the tenant at will to have accrued till the determination of the will, except, indeed, in cases falling within s. 7, from which this case of *cestui que trust* is excluded. See *ante*, pp. 679—684.

Right and title extinguished by s. 34.

It is proper, before concluding the note, to point out a singular alteration in the former law, produced by s. 34, which enacts that at the determination of the period limited by the Act, the right and title of the party to the land shall be *extinguished*. So that, if he enter after that period, he is a mere wrong-doer as against any person who happens to be in possession; *Holmes v. Newlands*, 11 A. & E. 44. The

Act differs in this respect from all previous statutes of limitation, excepting that regarding non-claim on a fine; their effect both upon debts, rights of action, and rights of entry, having been to bar the remedy, but leave the right *in esse*; see *per* Jessel, M.R., *Re Alison*, 11 Ch. D. 284, 296.

Consequently it was held that, notwithstanding R. S. C., 1875, O. XIX., r. 18, the defence of the statute might be raised upon demurrer; *Dawkins v. Penrhyn*, 6 Ch. D. 318, 4 App. Cas. 51. Further, after the lapse of the statutory period, the title, being extinguished, cannot be restored by a written acknowledgment; see *ante*, p. 691; or by payment of rent; *Lyell v. Kennedy*, 18 Q. B. D. 796; or by re-entry; *Brassington v. Llewellyn*, 27 L. J. Ex. 297; *Bryan v. Cowdal*, 21 W. R. 693.

Defence might be raised on demurrer.

And this section seems to have the collateral effect of giving the tortious possessor a title against all the world after the lapse of the prescribed period. It will, however, perhaps be found that the security of a purchaser is not ascertained, by this provision, in many cases where it would not have been so under the old system.

In *Doe v. Sumner*, 14 M. & W. 30, Parke, B., said that the effect of the statute is "to make a *parliamentary conveyance of the land to the person in possession* after" the period of limitations has elapsed; and in *Scott v. Nixon*, 3 Dru. & War. 388, Sugden, L.C., compelled an unwilling purchaser to take a title depending upon parol evidence of possession under this statute. But possession of a leasehold interest for the statutory period does not transfer to the person in possession the liabilities of the lessee; *Tichborne v. Weir*, 67 L. T. 735.

Effect of statute to make parliamentary conveyance to person in possession.

The case of *Doe v. Barnard*, 13 Q. B. 945, raises, however, a difficulty in ascertaining *to whom* the parliamentary conveyance has been made—if made to any one: the husband of the plaintiff had been in possession as tenant at will for eighteen years, ending in 1834, when he died; and she then became possessed, and remained in possession for thirteen years. The husband had left a son (not a party to the action), and it was held that the widow could not recover, upon the ground that, inasmuch as it appeared that her husband left a son, any fee in the father, of which his possession would be *primâ facie* evidence, descended to the son, and therefore her subsequent possession for thirteen years only could not prevail. It was said, also, that the

Quære to whom.
Doe v. Barnard.

twenty years' possession to obtain a transfer of the title "must be either by the same person, or several persons claiming one from the other." So that in this case, although the title of the original owner was extinguished, there was, according to the decision, no parliamentary conveyance of the land to any other person. This, it need scarcely be remarked, is a highly anomalous and exceptional result, and one which may well suggest a doubt as to the correctness of the decision which leads to it. The notion of land without an owner is inconsistent with the theory of real property in this country, and unless the crown be entitled, which could not have been intended, the occupier at the time the original title expires seems to be the person in whom the right of property vests. See *Solling v. Broughton*, (1893) A. C. 556.

*Dixon v.
Gayfere.*

See the question as to the effect of occupation of successive trespassers each for less, though in the aggregate for more, than the period of twenty years, discussed by Romilly, M.R., in *Dixon v. Gayfere*, 17 Beav. 421; though his *dicta* are disapproved by Cockburn, C.J., in *Asher v. Whitlock*, L. R. 1 Q. B. 1.

*Asher v.
Whitlock.*

In the latter case (where *Doe v. Barnard* was cited), it was held that a person in possession of land, without any other title, had a devisable interest, and that the heir of his devisee could maintain ejectment against a person who had entered on the land, and could not show title or possession in any one prior to the testator.

*Groome v.
Blake.*

In *Groome v. Blake*, 8 Ir. C. L. R. 428, the possession of the land by a receiver appointed by the Court of Chancery, during a portion of the twenty years, was held not to amount to such a disturbance of the possession as to affect the title of the person over whom the receiver was appointed.

Act does not
affect an
incorporeal
interest.

The Act does not affect an incorporeal interest, such as a right of common; for the interpretation clause (s. 1) limits the meaning of the word "land," as used in the Act, to corporeal hereditaments and tithes not belonging to a spiritual or eleemosynary corporation sole. It was, however, laid down before the Act of 1833 that, after twenty years' adverse enjoyment of the land free from the exercise of the right, the commoner's right of entry would be gone, and his remedy, if any, be an assize of common; *Hawke v. Bacon*, 2 Taunt. 156; *Creach v. Wilmot*, Id. 160; and see *Tapley v. Wainwright*, 5 B. & Ad. 395, where the point was apparently taken for

After twenty
years' adverse
enjoyment,
commoner's
right of entry
gone.

granted. That doctrine may have been founded on the notion that a right of common is a hereditament within 21 Jac. 1, c. 16. If this be so, then, inasmuch as the assize of common is abolished by s. 36 of the Act of 1833, the right of common would now (subject to the proviso in favour of persons under disabilities) be barred altogether after *twelve* years' adverse enjoyment. If, however, the doctrine was founded on a presumed release, the lapse of time would furnish merely evidence from which a jury might presume that such a release had been made: and this is certainly the case as to mere easements, such as a right of way; *Dogherty v. Beasley*, 1 Jones, Exch. Ir., 123. In *Edwards v. M'Leay*, Coop. C. C. temp. Eldon, 308, 318, Grant, M.R., said: "It may be true that the commoners are barred by having *acquiesced* for more than twenty years in the inclosure." The form of pleading adopted in *Hawke v. Bacon*, and *Tapley v. Wainwright*, assumed that the then existing statute of limitations operated.

Quære by 21
Jac. 1, c. 16;

or by pre-
sumed release.

The sections of the statute of James referring to this subject are repealed by the Stat. Law Rev. Act, 1863.

As to the operation of the Act of 1833 on the right to minerals, which are left unworked during the statutory period, see *Smith v. Lloyd*, 9 Exch. 562, *ante*, p. 643, and *Low Moor Co. v. Stanley Coal Co.*, 34 L. T. 186.

As to right to
minerals.

Although the word "land," as used in the Act of 1833, includes "tithes," when not belonging to a spiritual or eleemosynary corporation sole (s. 1), yet, whether the Act applies as between a landowner claiming from mere non-payment of tithes for the statutory period to hold tithe free, and the tithe-owner having an otherwise undisputed tithe, is a question which has given rise to much discussion, but may now, perhaps, be considered as settled. Lord Langdale, in *Dean of Ely v. Bliss*, 5 Beav. 574, held in effect that the Act did apply, and that in equity, twenty years' non-payment was a bar to the tithe-owner's right. But the Court of Exch., to which a case had been sent by Lord Lyndhurst, before whom that decision came by way of appeal, gave an opinion (15 M. & W. 617) that the Act did not apply to such a case, the plaintiffs there not seeking to recover *an estate or interest in* tithes, but *the tithes themselves*, and referred to their former decision in *Grant v. Ellis*, to which they thought Lord Langdale's attention had not been directed, as deciding the very question. Lord Cottenham

As to
"tithes."

Dean of Ely
v. Bliss.

was not satisfied with the question having been thus disposed of by the Court of Exch., and sent a similar case to the Court of C. P., where it was argued in H. T. 1849, and two judges, Cresswell and Vaughan Williams, JJ., made their certificate, agreeing with the opinion already expressed by the Court of Exch. Maule, J., however, dissented, and Wilde, C.J., having in the meantime been appointed Lord Chancellor, gave no opinion. The cause afterwards came on to be heard before Lord St. Leonards, who coincided in the view taken by the Court of Exch. and the majority of the Court of C. P., and after an elaborate examination of the statute overruled the plea; see *Dean of Ely v. Bliss*, 2 De G. M. & G. 459. It may be observed, that so far back as T. T. 1837, a majority of the Court of Exch. in Ireland gave an opinion upon the question to the same effect as that afterwards expressed by the Court of Exch. in England; see *Shannon v. Hodder*, 2 Ir. L. R. 223.

Recover."

In *Grant v. Ellis*, 9 M. & W. 113, the word "recover" was principally relied on as denoting the subjects to which s. 2 applied. So far as related to land, that word, in s. 2, it was said, clearly meant the same thing as "*obtain possession or seisin of*"; that the clause assumed one party to be in wrongful seisin or possession of land to which another had the right, and then limited the time within which the right must be asserted; and that it was very reasonable to suppose that the Legislature intended it to have the same meaning in respect to rents, of which, whether rents service, rent charges, or rents seck, upon the rent being withheld from him or paid to another, the party seized thereof might, prior to the Act, have elected to consider himself disseised, and by assize have recovered seisin; and that it was only to this sort of recovery that s. 2 had reference; see 9 M. & W. 122, 123; and *per Bosanquet, J., Paget v. Foley*, 2 B. N. C. 691; also *per Lord St. Leonards in Dean of Ely v. Bliss*, 2 De G. M. & G. 468.

"Rent."

It should be observed, however, that the decision in *Grant v. Ellis* was merely that "the word 'rent' in the statute did not mean a conventional rent *reserved by a lease*," and by no means warrants the proposition that s. 2 does not apply to any case of mere non-payment of rent, or to any action by the owner of a rent, against the person liable to pay it; see to the contrary, *Irish Land Commission v. Grant*, *per Lord Selborne*, 10 App. Cas. 14, 26.

Charities

After expressing doubts in *Incorporated Society v. Richards*,

1 Dru. & War. 258, 288, and *A.-G. v. Persse*, 2 Id. 67, within the
 Sugden, L.C., finally decided in *Charity Commissioners v.* statute.
Wybrants, 2 Jones & L. 182, that charities are within the
 statute. And this view has been adopted in the H. L.;
 see *Magdalen College v. Attorney-General*, 6 H. L. C. 189,
ante, p. 686. In most cases, however, as has been observed
 by Lord St. Leonards, the rights of charities would be saved
 under s. 25. See *Vend. & Pur.*, 13th ed., 402.

DOE *d.* CHRISTMAS *v.* OLIVER & ANOTHER.
SAME *v.* OLIVER & OTHERS.

MICHAELMAS.—10 *GEO.* 4, *B. R.*

[REPORTED 5 *MAN.* & *RY.* 202.]

The interest, when it accrues, feeds the estoppel.

EJECTMENT for certain messuages and lands situate in the parish of St. Margaret, in the town and borough of Leicester. Plea, not guilty. At the trial before D'Oiley, Serjt., at the Leicester Summer Assizes, 1828, a verdict was found for the plaintiff by consent, subject to the opinion of this court upon the following case :—

Theophilus Holmes, being seised in fee of certain tenements, by his last will and testament in writing, bearing date 29th Sept., 1784, duly executed and attested for the purpose of passing real estates, gave and devised as follows :—“ I give and devise the messuage or tenement wherein I now dwell, with the appurtenances thereto belonging, and the use of all my household goods, plate, linen, and other household furniture of every sort and kind which shall be about my said messuage or tenement at the time of my decease, and also my messuage or tenement in Belgrave Gate, Leicester, unto my wife Christian Holmes for and during her natural life; and from and after her decease, I give and devise the said messuage or tenement wherein I now dwell, with the appurtenances, and also my said messuages or tenements,” (in the said will described, being those for the recovery of which these actions are brought), “ with warehouses, stables and other buildings, yards, gardens, and backsides thereto belonging, in case I shall die without issue (but not otherwise), unto, between, and among all the children of my brother, the Rev. William Holmes, that shall be living at the time of my said wife’s decease, and to their heirs and assigns for ever.”

The testator died, seised of the premises in question, in Sept., 1785, without issue, and without altering or revoking his said will. On his death, his widow, who afterwards married Joseph Chamberlain, entered into possession of the tenements in question, and so continued until the time of her death, which happened in or about Sept., 1826. The William Holmes mentioned in the will of the testator had issue three children only; viz., James Harriman, Ann Mary, and Thomas Bradgate. James Harriman Holmes and Thomas Bradgate Holmes died without issue in the lifetime of the testator's widow. Ann Mary Holmes married Joseph Brooks Stephenson, and was the only child of William Holmes living in March, 1814, and at the time of the death of the testator's widow.

On the 4th March, 1814, and during the lifetime of the testator's widow, by indenture duly made between the said J. B. Stephenson and Ann Mary his wife (therein described as devisee named in the last will of the said Theophilus Holmes then deceased) of the first part, J. Connor, gent., of the second part, Charles Waldron of the third part, and Thomas Chandless, gent., a trustee on behalf of the said Charles Waldron and also of the said J. B. Stephenson and Ann Mary his wife, of the fourth part: the latter, in consideration of 600*l.*, granted to Charles Waldron, his executors, administrators, and assigns, for and during their natural lives and the life of the survivor, an annuity of 100*l.* to be charged upon and issuing out of the said messuages or tenements devised by the will of Theophilus Holmes; and for better securing the payment, granted, bargained, and sold to Thomas Chandless, his executors, &c., all the said premises, to hold, from and immediately after the decease of Christian Holmes, for the term of ninety-nine years. And then, after reciting that the said J. B. Stephenson and Ann Mary his wife did, as of Hilary Term then last, levy before the Court of C. P. at Westminster unto T. Chandless and his heirs one fine *sur conusance de droit come ceo*, &c., of the said premises, by the description of seven messuages, seven gardens, and one acre of land, with the appurtenances, in the parish of St. Margaret, in the town and borough of Leicester, of which fine no uses had as yet then been declared, it was by the said indenture agreed and declared that the said fine should be

and enure, in the first place, for confirming the said yearly rent-charge of 100*l.*, and in the next place, to the use of T. Chandless, his executors, &c., for and during the said term of ninety-nine years. The said last-mentioned indenture was duly executed by the parties, and a receipt for the consideration money indorsed, and a memorial of the same was duly inrolled in the Court of Chancery. The fine referred to by the said indenture was duly levied according to the same in Hilary Term, 54 G. 3, with proclamations. On the 11th April, 1823, T. Chandless died, having made a will and several codicils, and appointed Sir William Long, Knt., and Henry Gore Chandless, executors. On the 27th Jan., 1827, by indenture of that date between the said C. Waldron of the first part, the said executors of T. Chandless of the second part, Newbold Kinton, one of the lessors of the plaintiff, of the third part, and James Christmas, one other of the said lessors, of the fourth part, for the consideration therein expressed, the said annuity was assigned to the said N. Kinton; and the said term of ninety-nine years, for securing the same, was assigned to the said J. Christmas. On the 4th June, 1827, 1275*l.* became due in respect of the said annuity. The day of the demises laid in the declaration is the 1st Nov., 1827.

The questions for the opinion of the court are,

First, whether A. M. Stephenson, who was the only child of William Holmes living on the 4th March, 1814, and at the time of the death of Christian Holmes (afterwards Chamberlain), took a vested or contingent remainder under and by virtue of the will of Theophilus Holmes.

Secondly, whether the fine levied by Mr. and Mrs. Stephenson worked any forfeiture of the estate of the latter, or transferred any interest therein.

The case was argued at the sittings in Banco after Trinity Term, 1827, by *Preston* (with whom was *Denman*) for the plaintiff, and by *N. R. Clarke* for the defendant.

It was admitted on the part of the plaintiff that the estate given by Theophilus Holmes to the children of William Holmes was contingent during the lifetime of the testator's widow; but it was contended that the fine levied by the daughter of W. Holmes, though operative only by way of estoppel during the lifetime of the testator's widow, operated after her death, when

the contingency happened, on the estate which then became vested in the daughter of W. Holmes. And the cases of *Vick v. Edwards* (a), *Helps v. Hereford* (b), and *Davies v. Bush* (c), were cited and relied on.

For the defendant it was contended that the estate given to the daughter of W. Holmes could not be conveyed by the fine levied during the lifetime of the widow of T. Holmes, the testator, because a contingent remainder could not be so conveyed : and, therefore, that the estate still remained vested in Mr. and Mrs. Stephenson. That the fine levied by them operated by way of estoppel only, and that, of that, a stranger was not entitled to take advantage. And for the last position *Doe v. Martyn* (d) was cited and relied on.

The Court took time to consider their judgment, which was now delivered by

BAYLEY, J.—This case depended upon the effect of a fine levied by a person who had a contingent remainder in fee. The short facts were these : Ann Mary, the wife of Joseph Brooks Stephenson, was entitled to an estate in fee upon the contingency of her surviving Christian, the widow of Theophilus Holmes ; and she and her husband conveyed the premises to Thomas Chandless for a term of ninety-nine years, and levied a fine to support that conveyance. Christian, the widow, died, leaving Mrs. Stephenson living : so that the contingency upon which the limitation of the estate to Mrs. Stephenson depended happened, and this ejectment was brought by the assignees of the executors of Thomas Chandless, in whom the term of ninety-nine years was vested. It was admitted in argument on the part of the defendant that the fine was binding upon Mr. and Mrs. Stephenson, and all who claimed under them, by estoppel ; but it was insisted that such fine operated by way of estoppel only ; that it therefore bound only parties and privies, not strangers ; that the defendant, not being proved to come in under Mr. and Mrs. Stephenson, was to be deemed not a privy but a stranger ; and that, as to him, the estate was to be considered as still remaining in Mr. and Mrs. Stephenson. In support of this position reliance was placed upon the latter part of the judgment delivered by me

(a) 3 P. Wms. 372.

(b) 2 B. & Ald. 242.

(c) 1 M'Clel. & Y. 58.

(d) 2 M. & Ry. 485 ; 8 B. & C. 497.

in the case of *Doe d. Brune v. Martyn* (*e*), and that part of the judgment certainly countenances the present defendant's argument. But the reasoning in that case proceeds upon the supposition that a fine by a contingent remainderman operates by estoppel, *and by estoppel only*: its operation by estoppel, which is indisputable, was sufficient for the purpose of that decision; whether it operated by estoppel only, or whether it had a further operation, was perfectly immaterial in that case; and the point did not there require that investigation which the discussion of this case has rendered necessary. We have, therefore, given the subject that further consideration which it required, and we are satisfied, upon the authorities, that a fine by a contingent remainderman, though it operates by estoppel, does not operate by estoppel only, but has an ulterior operation when the contingency happens; that the estate which then becomes vested feeds the estoppel; and that the fine operates upon that estate, as though that estate had been vested in the conusors at the time the fine was levied.

The first authority which it is necessary to notice is *Rawlyns's Case* (*f*). There, Cartwright demised land, not his own, to Weston, for six years. Rawlyns, who owned the land, demised it to Cartwright for twenty-one years; and Cartwright re-demised it to Rawlyns for ten years. It was resolved that the lease by Cartwright, when he had nothing in the land, was good against him by conclusion, and that when Rawlyns re-demised to him, then was *his interest* bound by the conclusion; and that when Cartwright re-demised to Rawlyns, then was Rawlyns concluded also. Rawlyns, indeed, was bound as privy, because he came in under Cartwright; but the purpose for which I cite this case is, to show that as soon as Cartwright got the land, his interest in it was bound. In *Weale v. Lower* (*g*), the case was thus:—Thomas, a contingent remainderman in fee, demised to Grylls for five hundred years, and levied a fine to Grylls for five hundred years, and died. The contingency happened, and the remainder vested in the heir of Thomas, and, whether this demise was good as against the heir of Thomas, was the question. It was argued before Hale, C. J., and his opinion was that the

(*e*) 2 M. & Ry. 485; 8 B. & C. 497.
) 4 Co. Rep. 52.

(*g*) Pollexf. 54.

fine did operate at first by conclusion, and passed no interest, but bound the heir of Thomas ; that the estate, which came to the heir when the contingency happened, fed the estoppel ; and then the estate by estoppel became an estate in interest, and of the same effect as if the contingency had happened before the fine was levied ; and he cited *Rawlyns's Case*, 4 Coke, 53, in which it was held, that if a man leased land in which he had nothing, and afterwards bought the land, such lease would be good against him by conclusion, but nothing in interest till he bought the land : but that, as soon as he bought the land, it would become a lease in interest. The case was again argued before the Lord Chancellor, Lord Chief Justice Hale, Wild, Ellis, and Windham, Justices, and they all agreed that the fine at first enured by estoppel ; but that, when the remainder came to the conusor's heir, he should claim in nature of a descent, and therefore should be bound by the estoppel ; and then the estoppel was turned into an interest, and the conusee had then an estate in the land. In *Trevivan v. Lawrence* (*h*), Lord Holt cites 39 Ass. 18 (*i*), and speaks of an estoppel as creating an interest in or working upon the estate of the land, and as running with the land to whoever takes it. In *Vick v. Edwards* (*k*), cited by Mr. Preston, Lord Talbot must have considered a fine by a contingent remainderman as having the double operation of estopping the conusor's heirs till the contingency happened, and then of passing the estate. There, lands were devised to A. & B. and the survivor, and the heirs of such survivor, in trust to sell. Upon a reference to the Master, he reported that they could not make a good title, because the fee would vest in neither till one died. On exceptions to the Master's report, Lord Talbot held that a fine by the trustees would pass a good title to the purchaser by estoppel ; for, though the fee was in abeyance, one of the two trustees must be the survivor, and entitled to the future interest : consequently, his heirs claiming under him would be estopped, by reason of the fine by the ancestor, from saying *quod partes finis nihil habuerunt*, though he that levied the fine had at the time no right or title to the contingent fee. On the

(*h*) 2 Ld. Raym. 1048 ; see *post*, p. 724.

(*i*) Fol. 237.
(*k*) 3 P. Wms. 372.

following day he cited the case of *Weale v. Lower* (l), which I have before cited. Now, whether Lord Talbot was right in treating the fee as being in abeyance, and the limitation to the survivor and his heirs as a contingent remainder, or not, it is evident he did so consider them; and he must have had the impression that the fine would have operated, not by estoppel only, but by way of passing the estate to the purchaser, because, unless it had the latter operation as well as the former, it would not pass a good title to the purchaser.

Mr. Fearne, in his work on Remainders, c. 6, s. 5, says, "We are to remember, however, that a contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency;" and after stating the facts in *Weale v. Lower*, he says, "it was agreed that the contingent remainder descended to the conusor's heir; and though the fine operated at first by conclusion only, and passed no interest, yet the estoppel bound the heir; and that, upon the contingency, the estate by estoppel became an estate interest, of the same effect as if the contingency had happened before the fine was levied."

Upon these authorities, we are of opinion that the fine in this case had a double operation—that it bound Mr. and Mrs. Stephenson by estoppel or conclusion so long as the contingency continued: and that when the contingency happened, the estate which devolved upon Mrs. Stephenson fed the estoppel: the estate created by the fine, by way of estoppel, ceased to be an estate by estoppel only, and became an interest, and gave Mr. Chandless, and those having a right under him, exactly what he would have had in case the contingency had happened before the fine was levied.

Judgment for the Plaintiff.

(l) Pollexf. 54.

OPINION OF THE JUDGES
IN
THE DUCHESS OF KINGSTON'S CASE.

A. D. 1776.

[34 H. L. JO. 655 : 20 HOWELL ST. TR. 537.]

ORDERED by the Lords Spiritual and Temporal in parliament assembled, that the following questions be put to the Judges, viz. :—

1. Whether a sentence of the Spiritual Court against a marriage in a suit for jactitation of marriage is conclusive evidence so as to stop the counsel for the Crown from proving the said marriage in an indictment for polygamy ?

2. Whether, admitting such evidence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion ?

Whereupon the Lord Chief Justice of the Court of Common Pleas (Sir William de Grey, afterwards Lord Walsingham), having conferred with the rest of the judges present, delivered their unanimous opinion upon the said questions, with his reasons, as follow, viz. :—

My lords ; My lord chief baron (Sir Sidney Stafford Smythe), and the rest of my brethren, have desired me to deliver their answer to the questions your lordships have been pleased to propound to us.

That our opinion may be the better understood, it is necessary to make some observations on what has passed in argument upon the subject.

What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third ; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment

he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but, not being applicable to the present subject, it is unnecessary to state them.

From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court: secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment.

Upon the subject of marriage, the Spiritual Court has the sole and exclusive cognizance of questioning and deciding, directly, the legality of marriage; and of enforcing, specifically, the rights and obligations respecting persons depending upon it; but the Temporal Courts have the sole cognizance of examining and deciding upon all temporal rights of property: and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction; they do not want or require the aid of the Spiritual Courts; nor has the law provided any legal means of sending to them for their opinion; except where, in the case of marriage, an issue is joined upon the record in certain real writs, upon the legality of a marriage, or its immediate consequence, "general bastardy;" or, in like manner, in some other particular instances, lying peculiarly in the knowledge of their courts, as profession, deprivation, and some others; in these cases, upon

the issue so formed, the mode of trying the question is by reference to the ordinary, and his certificate, when returned, received, and entered upon the record in the Temporal Courts, is a perpetual and conclusive evidence against all the world upon that point: which exceptional extent, on whatever reasons founded, was the occasion of the statute of the 9th of Henry 6, requiring certain proclamations to be made for persons interested to come in, and be parties to the proceeding. But, even in these cases, if the ordinary should return no certificate, or an insufficient one, or if the issue is accompanied with any special circumstances, as if a second issue triable by a jury is formed upon the same record, or if the effect of the same issue is put into another form, a jury is to decide, and not the ordinary to certify, the truth; and to this purpose Sir William Staunford mentions a remarkable instance. Bigamy was triable by the bishop's certificate; but if the prisoner, to avoid the charge, pleads that the second espousals were null and void, because he had a former wife living, this special bigamy was not to be tried by the bishop's certificate.

So that the trial of marriage, either as to legality or fact, was not absolutely, and from its nature, an object *alieni fori*.

There was a time when the Spiritual Courts wished that their determinations might in all cases be received as authentic in the Temporal Courts; and in that solemn assembly of the king, the peers, and bishops, and judges, convened for the purpose of settling the demands of the church by Edward the Second, one of the claims was expressed in these words: "Si aliqua causa, vel negotium, cujus cognitio spectat ad forum ecclesiasticum, et coram ecclesiastico iudice fuerit sententialiter terminatum, et transierit in rem judicatam, nec per appellationem fuerit suspensum; et postmodum, coram iudice seculari, super eadem re inter easdem personas questio moveatur, et provetur per testes vel instrumenta, talis exceptio in foro seculari non admittatur." The answer to which demand was expressed in this manner:—"Quando eadem causa, diversis rationibus, coram iudicibus ecclesiasticis, et secularibus, ventilatur, dicunt quod (non obstante ecclesiastico iudicio) curia regis ipsum tractet negotium, ubi sibi expedire videtur." For which Lord Coke gives this reason, second Institute, c. 22: "For the Spiritual Judges' proceedings

are for the correction of the spiritual inner man, and 'pro salute animæ,' to enjoin him penance; and the judges of the Common Law proceed to give damages and recompense for the wrong and injury done:" and then adds, "and so this article was deservedly rejected."

And the same demand was made, and received the same answer, in the third year of King James the First.

It is to be observed that this demand related only to civil suits between the same parties; and that the sentence should be received as a plea in bar. But this attempt and miscarriage did not prevent the Temporal Courts from showing the same respect to their proceedings as they did to those in other courts. And therefore where, in civil causes, they found the question of marriage directly determined by the Ecclesiastical Courts, they received the sentence, though not as a plea, yet as a proof of the fact; it being an authority accredited in a judicial proceeding by a court of competent jurisdiction; but still they received it upon the same principles, and subject to the same rules, by which they admit the acts of other courts.

Hence a sentence of nullity, and a sentence in affirmance of a marriage, have been received as conclusive evidence on a question of legitimacy arising incidentally upon a claim to a real estate.

A sentence in a cause of jactitation has been received upon a title in ejectment, as evidence against a marriage, and, in like manner, in personal actions immediately founded on a supposed marriage.

So a direct sentence, in a suit upon a promise of marriage, against the contract, has been admitted as evidence against such contract, in an action brought upon the same promise for damages, it being a direct sentence of a competent court, disproving the ground of the action.

So a sentence of nullity is equally evidence in a personal action against a defence founded upon a supposed coverture.

But in all these cases, the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it; or claimed under those who were parties and had acquiesced.

But although the law stands thus with regard to civil suits,

proceedings in matters of crime, and especially of felony, fall under a different consideration: first, because the parties are not the same; for the King, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the Ecclesiastical Court, and cannot be admitted to defend, examine witnesses, in any manner intervene, or appeal: secondly, such doctrines would tend to give the Spiritual Courts, which are not permitted to exercise any judicial cognisance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs.

The ground of the judicial powers given to Ecclesiastical Courts is, merely, of a spiritual consideration, "*pro correctione morum, et pro salute animæ.*" They are therefore addressed to the conscience of the party. But one great object of temporal jurisdiction is the public peace: and crimes against the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was also so. A felony by statute becomes so at the moment of its institution. The Temporal Courts alone can expound the law, and judge of the crime, and its proofs; in doing so, they must see with their own eyes, and try by their own rules, that is, by the common law of the land; it is the trust and sworn duty of their office.

When the Acts of Henry the Eighth first declared what marriages should be lawful, and what incestuous, the Temporal Courts, though they had before no jurisdiction, and the Acts did not by express words give them any upon the point, decided, incidentally, upon the construction, declared what marriage came within the Levitical degrees, and prohibited the Spiritual Courts from giving or proceeding upon any other construction.

Whilst an ancient statute subsisted (2 H. 4, c. 15), by which personal punishment was incurred on holding heretical doctrines, the Temporal Courts took notice, incidentally, whether the tenet was heretical or not; for "the King's Court will examine all things ordained by statute."

When the statute of W. 3 made certain blasphemous doctrines a temporal crime, the Temporal Courts alone could determine

whether the doctrine complained of was blasphemous so as to constitute the crime.

If a man should be indicted for taking a woman by force and marrying her, or for marrying a child without her father's consent; or for a rape where the defence is that "the woman is his wife;" in all these cases, the Temporal Courts are bound to try the prisoner by the rules and course of the common law, and incidentally to determine what is heretical, and what is blasphemous; and whether it was a marriage within the statute—a marriage without consent; and whether, in the last case, the woman was his wife: but if they should happen to find that sentences, in the respective cases, had been given in the Spiritual Court upon the heresy, the blasphemous doctrines, the marriage by force, the marriage without consent, and the marriage on the rape, and the Court must receive such sentences as conclusive evidence, in the first instance, without looking into the case, it would vest the substantial and effective decision, though not the cognizance of the crimes, in the Spiritual Court, and leave to the jury, and the Temporal Courts, nothing but a nominal form of proceeding, upon what would amount to a predetermined conviction or acquittal: which must have the effect of a real prohibition, since it would be in vain to prefer an indictment, where an act of a foreign court shall at once seal up the lips of the witnesses, the jury, and the court, and put an entire stop to the proceeding.

And yet it is true that the Spiritual Courts have no jurisdiction, directly or indirectly, in any matter not altogether spiritual; and it is equally true that the Temporal Courts have the sole and entire cognizance of crimes which are wholly and altogether temporal in their nature.

And if the rule of evidence must be, as it is often declared to be, reciprocal; and that, in all cases in which sentences favourable to the prisoner are to be admitted as conclusive evidence for him, the sentences, if unfavourable to the prisoner, are in like manner conclusive evidence against him: in what situation must the prisoners be, whose life, or liberty, or property, or fame rests on the judgment of courts, which have no jurisdiction over them in the predicament in which they stand? and in what situation are the Judges of the Common Law, who must condemn,

on the word of an Ecclesiastical Judge, without exercising any judgment of their own?

The Spiritual Court alone can deprive a clergyman. Felony is a good cause of deprivation: yet in Lord Hobart's Reports it is held that they cannot proceed to deprive for felony, before the felony has been tried at law; and although, after conviction, they may act upon that, and make the conviction a ground of deprivation, neither side can prove or disprove anything against the verdict; because, as that very learned Judge declares, "it would be to determine, though not capitally, upon a capital crime, and thereby judge of the nature of the crime, and the validity of the proofs; neither of which belongs to them to do."

If, therefore, such a sentence, even upon a matter within their jurisdiction, and before a felony committed, should be conclusive evidence on a trial for felony committed after, the opinion of a judge, incompetent to the purpose, resulting (for aught appears) from incompetent proofs (as suppose the suppletory oath), will direct or rule a jury and a Court of competent jurisdiction, without confronting any witnesses, or hearing any proofs; for the question supposes, and the truth is, that the Temporal Court does not and cannot examine, whether the sentence is a just conclusion from the case, either in law or fact; and the difficulty will not be removed by presuming that every Court determines rightly, because it must be presumed too, that the parties did right in bringing the full and true case before the Court; and if they did, still the Court will have determined rightly by ecclesiastical laws and rules, and not by those laws and rules by which criminals are to stand or fall in this country.

If the reason for receiving such sentence is, because it is the judgment of a Court competent to the inquiry then before them; from the same reason, the determination of two Justices of the Peace upon the fact or validity of a marriage, in adjudging a place of settlement, may hereafter be offered as evidence, and give the law to the highest Court of criminal jurisdiction.

But if a direct sentence upon the identical question, in a matrimonial cause, should be admitted as evidence (though such sentence against the marriage has not the force of a final decision, that there was none), yet a cause of jactitation is of a different nature; it is ranked as a cause of defamation only, and not as a

matrimonial cause, unless where the defendant pleads a marriage ; and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect, viz. "that the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears;" leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage in another cause : and if such sentence is no plea to a new suit there, and does not conclude the court which pronounces, it cannot conclude a Court which receives, the sentence, from going into new proofs to make out that or any other marriage.

So that, admitting the sentence in its full extent and import, it only proves that it did not yet appear that they were married, and not that they were not married at all ; and by the rule laid down by Holt, L.C.J., such sentence can be no proof of anything to be inferred by argument from it ; and therefore it is not to be inferred that there was no marriage at any time or place, because the court had not then sufficient evidence to prove a marriage at a particular time and place. That sentence and this judgment may stand well together, and both propositions be equally true : it may be true that the Spiritual Court had not then sufficient proof of the marriage specified, and that your lordships may now, unfortunately, find sufficient proof of some marriage.

But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within ; yet, like all other acts of the highest judicial authority, it is impeachable from without : although it is not permitted to show that the Court was mistaken, it may be shown that they were misled.

Fraud is an extrinsic, collateral act ; which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal.

In civil suits all strangers may falsify, for covin, either fines, or real or feigned recoveries ; and even a recovery by a just title, if collusion was practised to prevent a fair defence ; and this whether the covin is apparent upon the record, as not essoining, or not demanding the view, or by suffering judgment by confession

or default; or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas.

In criminal proceedings, if an offender is convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself, may be traversed by a purchaser, whose conveyance would be affected as it stands; and even after a conviction by verdict, he may traverse the time.

In the proceedings of the Ecclesiastical Court the same rule holds. In *Dyer* there is an instance of a second administration, fraudulently obtained, to defeat an execution at law against the first; and the fact being admitted by demurrer, the Court pronounced against the fraudulent administration. In another instance an administration had been fraudulently revoked; and the fact being denied, issue was joined upon it; and the collusion being found by a jury, the Court gave judgment against it.

In the more modern cases, the question seems to have been whether the parties should be permitted to prove collusion; and not seeming to doubt but that strangers might. So that collusion, being a matter extrinsic of the cause, may be imputed by a stranger, and tried by a jury, and determined by the Courts of temporal jurisdiction.

And if fraud will vitiate the judicial acts of the Temporal Courts, there seems as much reason to prevent the mischiefs arising from collusion in the Ecclesiastical Courts, which, from the nature of their proceedings, are at least as much exposed, and which we find have been, in fact, as much exposed, to be practised upon for sinister purposes, as the Courts in Westminster Hall.

We are therefore unanimously of opinion:

First, that a sentence in the Spiritual Court against a marriage in a suit of jactitation of marriage is not conclusive evidence, so as to stop the counsel for the Crown from proving the marriage in an indictment for polygamy.

But secondly, admitting such sentence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion.

Die Sabbati, 20 Aprilis, 1776.

Ordered by the Lords Spiritual and Temporal in Parliament assembled, that the Lord Chief Justice of the Court of Common Pleas be, and he is hereby desired to favour this House with a copy of his Argument upon the Questions proposed to the Judges by this House yesterday.

HUGHES v. CORNELIUS.

TRINITY, 32 CAR. 2.—B. R.

[REPORTED 2 SHOWER, 232.]

The sentence in a foreign Court of Admiralty decreeing a ship to be lawful prize, is conclusive ; and therefore, though erroneous, the owner cannot recover the ship back by trover against the vendee.

TROVER brought for a ship and goods, and on a special verdict there is found a sentence in the Admiralty Court in France, which was with the defendant.

And now *per curiam* agreed and adjudged that, as we are to take notice of a sentence in the Admiralty here, so ought we of those abroad in other nations, and we must not set them at large again, for otherwise the merchants would be in a pleasant condition ! For suppose a decree here in the Exchequer, and the goods happened to be carried into another nation, should the courts abroad unravel this ? It is but agreeable with the law of nations that we should take notice and approve of the laws of their countries in such particulars. If you are aggrieved, you must apply yourself to the king and council ; it being a matter of government, he will recommend it to his liege ambassador if he see cause ; and if not remedied, he may grant letters of marque and reprisal.

And this case was so resolved by all the Court, upon solemn debate ; this being of an English ship taken by the French and as a Dutch ship, in time of war between the Dutch and the French.

Judgment for the defendants (a).

(a) S. C., Sir T. Raym. 473 ; Skin. 59 ; see 2 Ld. Raym.

TREVIVAN v. LAWRENCE ET ALIOS.

MICHAELMAS, 3 ANNE.—B. R.

[REPORTED 1 SALK., 276.]

Estoppel.

Scire facias against tertendants reciting the judgment of a wrong Term, and upon nul tiel record judgment for the plaintiff, and after elegit ejectment brought; the defendant is estopped to take advantage of the variance.

Where estoppel works on the interest in the land, it runs with it and is a title.

Jury is bound by estoppel unless the party leaves the fact at large by pleading.

In ejectment upon the demise of R. V. a special verdict was found, viz., that S. R. was seised in fee of the lands in question, and that being so seised H. M. recovered judgment against him in debt for 127*l.*, in B. R., in Michaelmas Term, 1656, which they find *in hæc verba* :—That in Hilary 13 W. 3, the lessor of the plaintiff, as administrator of the said H. M., sued a *scire facias*, reciting the judgment as of Trinity Term, against the tertendants of the lands which the said S. R. had on the day of the judgment recovered, or at any time afterwards. That the tertendants (of which the defendant was one) appeared and pleaded *nul tiel* record, and issue joined thereupon; and a day was given to bring in the record, at which day the record of the judgment of Michaelmas Term, 1656, was produced, and judgment given *quod habetur tale recordum*, and execution awarded: That thereupon the plaintiff sued out an *elegit*, upon which an inquisition was taken, and the lands in question extended; and for the variance between the judgment recited in the *scire facias*, and that given in evidence, the Jury doubted. After argument, and consideration from Easter Term to Michaelmas, the Court held that the defendants were estopped by this judgment in the *scire facias*, to say that there was no judgment in Trinity Term, because that matter had been tried against them, and the defen-

dants were concluded to falsify the judgment in the point tried. Thus, if a *scire facias* be brought against the issue in tail upon a judgment in debt against the ancestor, and he being warned makes default, he shall not come afterwards and say that he is tenant in tail; so if he plead any other matter, and it is found against him. Also they held the judgment upon the *scire facias* is sufficient title in the ejectment, and the first judgment need not be given in evidence.

2ndly. The Court held, not only that the parties, but all claiming under them, or this recovery, would be bound by this estoppel. As if a man make a lease by indenture of D., in which he hath nothing, and after purchases D. in fee, and after bargains and sells it to A. and his heirs, A. shall be bound by this estoppel; and that where an estoppel works on the interest of the lands, it runs with the land into whose hands soever the land comes, and an ejectment is maintainable upon the mere estoppel.

3rdly. The Court held, that not only the parties, and all claiming under them, but the Court and Jury were bound by this estoppel, and that the Jury cannot find against this estoppel; and the Court took this difference, that where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the Jury are bound by the estoppel; for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but take issue on the fact, the Jury shall not be bound by the estoppel, for then they are to find the truth of the fact which is against him. Thus, in debt for rent on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence, that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture and estopped him; but if the defendant plead *nihil habuit*, &c., and the plaintiff will not rely on the estoppel, but reply *habuit*, &c., he waives the estoppel and leaves it at large, and the Jury shall find the truth notwithstanding his indenture (a).

(a) S. C., 3 Salk. 151; 2 Ld. Raym. 1036, 1048; Holt, 282; 6 Mod. 256.

Nature of an
estoppel.

It is intended in this note to offer some remarks upon the nature of *estoppels*, a head of law once tortured into a variety of absurd refinements, but now almost reduced to consonancy with the rules of common sense and justice.

The definition of *estoppel* given by Lord Coke is, to be sure, a little startling:—"An *estoppel* is where a man is concluded by his own act or acceptance to say the truth." And, certainly, in our old law books, truth appears to have been frequently shut out by the intervention of an estoppel, where reason and good policy required that it should be admitted. However, notwithstanding the unpromising definition of the word *estoppel*, it is in no wise unjust or unreasonable, but, on the contrary, in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act. *Interest reipublicæ ut sit finis litium*—but, if matters which have been once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion. It is wise, therefore, to provide certain means by which a man may be concluded, not from saying the truth, but from saying that that which, by the intervention of himself or his, has once become accredited for truth, is false. And probably no code, however rude, ever existed without some such provision for the security of men acting, as all men must, upon the representations of others.

Estoppel a
conclusive
admission.

An estoppel, therefore, is an *admission*, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature—so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it—though he may show that the person relying on it is estopped from setting it up, since that is not to deny its conclusive effect as to himself, but to incapacitate the other from taking advantage of it.

Such being the general nature of an estoppel, it matters not what is the fact thereby admitted, nor what would be the ordinary and primary evidence of that fact, whether matter of record, or specialty, or writing unsealed, or mere parol: the fact may in each case be proved, the ordinary evidence being rendered unnecessary, by an estoppel; and

this is no infringement on the rule of law requiring the best evidence and forbidding secondary evidence to be produced till the sources of primary evidence have been exhausted, for the estoppel professes, not to supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted: and so too has it been held that an *admission*, which is of the same nature as an estoppel though not so high in degree, may be allowed to establish facts, which, were it not for the admission, must have been proved by certain steps appropriated by law to that purpose; for instance, in *Bringloe v. Goodson*, 5 B. N. C. 739, where a deed was recited to be executed in pursuance of a power contained in the will of S., a will purporting to be that of S. was produced, and there was some slight evidence that it was a will of S. This was held sufficient evidence to go to the jury that the will produced was executed by S. without calling the attesting witnesses. "I do not put the admission," said Tindal, C.J., "so high as an estoppel, but it has its effect, on the principle laid down in *Shelley v. Wright*, Willes, 9, where a party executing a deed was held to be estopped by the recital of a particular fact in that deed to deny such fact." See also *Slatterie v. Pooley*, 6 M. & W. 664; *Newhall v. Holt*, Id. 662; *Howard v. Smith*, 3 M. & Gr. 254; *Fox v. Waters*, 12 A. & E. 43. See, however, *Gillett v. Abbott*, 7 A. & E. 783, where a deed reciting another deed was admitted on the record, but it was held that it involved the admission of so much only of the second deed as was recited, and that in order to introduce the rest, strict proof was requisite.

Admission of similar effect but less in degree.

Reference may be made, on the question how far a deposition used in a cause is evidence of admission by conduct against the party using it, to *Richards v. Morgan*, 4 B. & S. 641, where the earlier authorities on this subject are collected and examined, and where Cockburn, C.J., and Crompton, J., held (*diss.* Blackburn, J.), that a deposition of a witness in Chancery (taken under the old system of taking evidence in that court, and used afterwards in the Chancery proceedings on behalf of the defendant in the suit), was receivable in evidence against him in a subsequent action of replevin, brought against him by a third person, as primary evidence of admission by conduct. See also *per* Blackburn, J., in *Hutchinson v. Glover*, 1 Q. B. D. 138.

Deposition how far evidence of admission by conduct.

Three kinds
of estoppel.

“Touching *estoppels*,” says Lord Coke, “which are a curious and excellent sort of learning, it is to be observed that there be three kinds of estoppels: viz., *by matter of record, by matter in writing, and by matter in pais*.” Although his lordship uses the word “writing,” it is clear that the writing which is to operate as an estoppel must be a *deed*; see *Straton v. Rastall*, 2 T. R. 366; *Lampon v. Corke*, 5 B. & Ald. 606, 611; *Graves v. Key*, 3 B. & Ad. 313. Estoppels, therefore, are—

1. *By matter of record.*
2. *By deed.*
3. *In pais.*

Estoppel by
record.

R. v. Carlile.

Judgment of
Lord Tenter-
den.

A number of instances of *estoppel by matter of record* are to be found in the old books, which all serve to illustrate one proposition, viz., that a record imports such absolute verity, that no person against whom it is producible shall be permitted to aver against it. An instance of this occurred in *R. v. Carlile*, 2 B. & Ad. 362. There the defendant, having been convicted of a libel, brought a writ of error in the K. B., assigning for error in fact, that there was but one of the justices named in the commission present when the jury gave their verdict. On the record returned to the K. B., which was made up in the ordinary way, it appeared that a sufficient number of the justices were present, and the court held that it was not competent to the defendant to question the fact so stated. “The authorities,” said Lord Tenterden, delivering the judgment, “are clear that a party cannot be received to aver, as error in fact, a matter contrary to the record. In 1 Inst. 260, Lord Coke says: ‘The rolls being the records or memorials of the judges of the courts of record, import in them such uncontrollable credit and verity, as they admit of no averment, plea, or proof to the contrary. And, if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself; and the reason hereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end of controversies, which should be inconvenient.’ The cases from Yelverton and Sir T. Raymond (*King v. Gosper*, Yelv. 58; *Okeover v. Overbury*, T. Raym. 231) are direct authorities upon this point, as well as that for which they were cited; and one of the instances put by Lord Hale, viz., that the court was not sitting, is very like the present case. Other cases were quoted at the bar upon this point (*Whistler v. Lee*, Cro. Jac. 359;

Plommer v. Webb, 2 Ld. Raym. 1415; and the authorities in Bac. Abr. tit. *Error*), and it is unnecessary to repeat them; but it may be proper to observe that one of them, viz., *Molins v. Werby*, 1 Lev. 76, 1 Sid. 94, 1 Keble, 355, is quite analogous to the present. That was a writ of error on a judgment in the Palace Court, said to be holden before James, Duke of Ormond: the error assigned was, that the court was not holden before the duke, but before his deputy; and this was held not assignable, being contrary to the record. In the case of *Bowsse v. Cannington*, Cro. Jac. 244, the error assigned was, that one W. B., of Bradfield, was returned upon the jury process; and one W. B., of Metfield, who was another person, and not returned, was sworn. And this was held not assignable for error, because contrary to the record, and the party estopped: for, otherwise, every record might be brought in question upon such surmise. I will mention one more case only, viz., *Cole v. Greene*, 1 Lev. 309. An action of waste was brought in the Court of Hustings of the City of London; there were two trials: upon the first the verdict was for the plaintiff, and upon the second for the defendant, and the judgment was given for the defendant. The plaintiff brought a writ of error, which was heard before several of the judges assigned for that purpose in St. Martin's-le-Grand; the errors there assigned are not applicable to the present case. The judgment given for the defendant in the Hustings was reversed; and judgment given for the plaintiff on the first verdict. Upon this reversal of the judgment, the original defendant brought a writ of error in the H. L., and there assigned for error that the jury did not come out of the four nearest wards, as by the custom of London they ought to do. The defendant in error pleaded *in nullo est erratum*, and upon argument, the lords, with the advice of the judges, resolved, first, that this was not assignable for error, being contrary to the record, because the award of the *venire facias* is out of the four nearest wards, and the writ returned served accordingly; and secondly, that *in nullo est erratum* is a demurrer; and although there be error in fact, that is not confessed by the demurrer, it not being assignable, but the demurrer upon it is in point of law, because not assignable, and the judgment given at St. Martin's was affirmed. This is a judgment pronounced by the highest tribunal of the country; the matter is settled, as I have before observed, by a series of decisions, and the rules in this respect have

Estoppel by
record.

Cole v. Greene.

Estoppel by
record.

Other in-
stances.

Huffer v.
Allen.

Wildes v.
Russell.

been perfectly established and long known and received as law in Westminster Hall."

See also *Reed v. Jackson*, 1 East, 355, where the court would not permit evidence to be given that the verdict had been entered by a mistake of the associate; and *Irwin v. Grey*, L. R. 1 C. P. 171, where the court would not allow an averment of error against a record in the ordinary form on the ground that a special jury had not been properly summoned or called. To a similar effect are *R. v. Shaw*, R. & R. C. C. 526, *Leighton v. Leighton*, 1 Stra. 210, and *Re Newton*, 16 C. B. 97; but see *Want v. Moss*, 70 L. T. 178, *post*, p. 752. For instances of a similar principle applied in favour of statements in convictions, see *Brittain v. Kinnaird*, 1 B. & B. 432; *Re Clarke*, 2 Q. B. 619. A later instance of the application of the rule, that no person against whom a record is producible can be permitted to aver against it, so long as it stands unreversed, will be found in *Huffer v. Allen*, L. R. 2 Ex. 15. There, A. having issued against B. a writ of summons, specially indorsed for 28*l.*, received from him 10*l.* on account of the debt, but notwithstanding the payment, afterwards signed judgment against him for the whole 28*l.*, and issued a *ca. sa.* under which B. was compelled to pay the whole amount. B. then, instead of taking advantage of the equitable jurisdiction of the court over its judgments, brought an action against A., charging him with having signed judgment, and issued execution, maliciously and without probable cause; but it was held that, whilst the judgment stood for the whole amount, B. was estopped by the record from disputing the validity of the judgment or execution.

In *Wildes v. Russell*, L. R. 1 C. P. 722, a clerk of the peace, who had been dismissed by the justices, brought an action, for money had and received, against his successor, to try his right to the fees of the office. It appeared on the statement of the plaintiff's counsel that the justices at quarter sessions had found the plaintiff guilty of contumaciously refusing to record an order made by the sessions, and had therefore adjudged him to be dismissed from his office. Upon this statement Erle, C.J., ruled that it was not competent for the plaintiff to impeach in that action the validity of the order of quarter sessions, and directed a nonsuit; a ruling which was supported by the full court, after a careful examination of the authorities. "Whether or not," said Montague Smith, J., "the evidence laid

before the quarter sessions substantiated the charges (against the plaintiff), I abstain from entering into; that question does not arise before us. It is an essential attribute in the constitution of all courts of record that their judgments are conclusive as to the facts upon which they profess to proceed, and cannot be traversed.”

Estoppel by
record.

However, this conclusive effect of a record is limited by certain rules and considerations. Several cases are mentioned in Com. Dig. *Estoppel*, E. 1 to 10 (most of which will be found to apply not merely to an estoppel by record, but to all cases of estoppel whatever), in which it does not operate conclusively. For instance—

Limitations
the estoppel.

1. *Where the record is coram non judice.* As, if the record were of an indictment purporting to have been determined in a court having no criminal jurisdiction. See *R. v. Hutchings*, 6 Q. B. D. 300, 304 *ad finem*; *A.-G. for Trinidad v. Eriché*, (1893) A. C. 518.

2. *Where the truth appears in the same record* (Co. Litt. 352 b). As, for instance, where the record shows that a judgment which is relied upon as an estoppel has been reversed in error. But, as to the case of deeds, see *post*, p. 804.

3. *Where the thing averred is consistent with the record*, which is, indeed, no exception at all. On this rule, see *Howlett v. Tarte*, *post*, p. 744.

4. *Where the allegation in the record is uncertain.* For an estoppel, not being favoured by the law, ought to be certain to every intent; Co. Litt. 352 b, 303 a. And therefore, “if a thing be not directly and precisely alleged, it shall be no estoppel;” Co. Litt. 352 b. See *post*, p. 745, and *Hobbs v. Henning*, *post*, p. 784.

5. *Or is alleged merely by way of supposal.* The words used by Lord Coke are, “Matters alleged by way of supposal in counts shall not conclude after nonsuit. Otherwise it is after judgment given. And, after nonsuit, albeit the supposal in the count shall not conclude, yet the barre, title, replication, or other pleading, of either party, which is precisely alleged, shall conclude after nonsuit, and hereby are the books reconciled;” Co. Litt. 352 b.

6. *Or is not traversable or material.* See *A.-G. v. King*, 5 Price, 195; Co. Litt. 352 b; and *Concha v. Concha*, 11 App. Cas. 541. As, for instance, the day in an indictment. On this principle, too, seems to have proceeded *Skipwith v. Green*, 1 Stra. 610, 8 Mod. 311, where the tenant was held

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record.

not to be estopped by the description of the nature of the land in the lease.

7. *Or where there is an estoppel against an estoppel.* For, to use the expression of Lord Coke, "estoppel against estoppel setteth the matter at large." See *R. v. Hutchings*, 6 Q. B. D. 300, 303.

8. To these may be added the rule that *estoppels ought to be mutual*—laid down by many of our text writers; see Co. Litt. 352; Cro. Eliz. 37; *ante*, p. 718; and also *Concha v. Concha*, 11 App. Cas. 541. Thus, if a man take a lease of his own lands from a married woman by indenture, this works no estoppel on either part, because, the married woman not being estopped by reason of her disability, the lessee is not so. Yet this rule, that an *estoppel must be mutual, otherwise neither party is bound*, must be taken with some limitation, and probably on accurate investigation would be found to apply to those cases only where *both parties are intended to be bound*, since otherwise there could be no estoppel by deed poll. Indeed, in Bac. Abr. tit. *Leases*, O, it is remarked that, where a lease is by deed poll, the lessee is not estopped to say that the lessor had nothing in the land; "but," it is added, "it should seem that such lease by deed poll binds the lessor himself as much as if it were by indenture, because it is executed on his part with the very same solemnity, and therefore it should seem that he is bound by such lease by way of estoppel."

9. It is also a rule that there is *no estoppel where an interest passes*. The meaning of which is that the person who accepts a grant is not estopped from saying that it does not pass so great an estate as it purports to convey, though he is estopped from saying that it passes no estate at all. The cases decided on this point will be hereafter mentioned. (See *post*, p. 806.) As to the limitations on this rule, see the note to Bythewood and Jarman (by Sweet), vol. 9, p. 419.

Earlier judgment must have been intended to be final decision.

10. It is also necessary, as a general rule, that the earlier judgment which is set up in a plea of *res judicata* should have been intended to be a *final decision* between the parties. This rule is well illustrated by *Langmead v. Maple*, 18 C. B. N. S. 255, where, to a declaration for an injury to the plaintiff's reversion by building upon his wall, the defendant pleaded that the same question had been determined against the plaintiff by the Court of Chancery, and it was held to be a good replication that that court in dismissing the plaintiff's bill had reserved to him the right

of proceeding at law in respect of the matters complained of. See also *Nouvion v. Freeman*, 15 App. Cas. 1, *post*, p. 778.

Estoppel by record.

The principal limitation to the conclusive effect of a record is that arising from the consideration that it is, in most cases, not binding, or even evidence, as between all persons.

Record not binding or even evidence between all persons.

Questions of this sort usually arise on *judgments*, they being by far the most extensive species of records. With regard to their conclusive effect, they may be divided into two classes :

Judgments.

1. Judgments *in rem*.

2. Judgments *in personam* ; or perhaps it would be more accurate to say *inter partes*, since, as will presently be pointed out more clearly, an adjudication upon the *status* of a particular person is as much entitled to the conclusive effect of a judgment *in rem*, as is an adjudication on the *status* of a particular inanimate thing.

With regard to both these classes one observation may be made, viz., that for the mere purpose of proving the existence of a judgment, the production of a record of either sort is conclusive upon all the world. Thus, though a judgment against A. is, generally speaking, no evidence against B., yet, where A. sues B. for negligence as his agent, he may, to prove the consequences of the negligence to himself, produce the record of a judgment obtained against him by a third party in an action brought in consequence of that negligence. The verdict in such case, to use the expressions of the court in *Green v. New River Co.*, 4 T. R. 590, is evidence as to the quantum of damages, though not as to the fact of the injury. See also *R. v. Hebden*, 2 Str. 1109, B. N. P. 231. *Pritchard v. Hitchcock*, 6 M. & Gr. 151, is to the same effect. It was an action upon a guarantee that certain bills accepted by H. would be paid at maturity ; the defendant pleaded payment by the acceptor in satisfaction, which was traversed by the replication ; the acceptor had in fact handed over the amount of the bills to the plaintiff, but, a fiat in bankruptcy having issued against him, his assignees recovered the money in an action for money had and received. It was held that the record of the judgment recovered by the assignees was not conclusive (if indeed any) evidence to show that the money belonged, not to the acceptor, but to his assignees, but that it was admissible as a medium of proof to show that the money had been recovered by them.

To prove existence of judgment production of record conclusive.

Verdict not *inter partes* evidence as to quantum of damages, not as to fact of injury.

Estoppel by
record.

Distinction
between judg-
ment *in rem*
and *inter*
partes.

Judgment
in rem.

Instances of
judgments *in*
rem in Courts
of Record.

Judgments of
Exchequer in
certain cases.

But, in the great majority of cases, the record of the judgment is produced in evidence, not for the purpose of proving the bare fact of its own existence, but for that of concluding some party upon the point adjudicated. And here arises the distinction, above adverted to, between judgments *in rem* and judgments *inter partes*; the former having this conclusive effect, as between all persons whatever; the effect of the latter being much more limited.

A judgment *in rem* I conceive to be an adjudication pronounced (as indeed its name denotes) upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose. Such an adjudication, being a most solemn declaration from the proper and accredited quarter that the *status* of the thing adjudicated upon is as declared, concludes all persons from saying that the *status* of the thing adjudicated upon was not such as declared by the adjudication. See *R. v. Hartington*, 4 E. & B. 780; *Cammell v. Sewell*, 3 H. & N. 617, 5 Id. 728; *Simpson v. Fogo*, 29 L. J. Ch. 657, 32 Id. 249; and *Castrique v. Imrie*, 8 C. B. N. S. 1, 405, L. R. 4 H. L. 414, cited *post*, p. 789.

The principal examples of the effect of judgments *in rem* occur in the Spiritual and Admiralty Courts, and will be adverted to hereafter. We are now upon the judgments of courts, strictly speaking, of record; and, among these, some instances may be found of decisions *in rem*.

Thus, the Court of Exchequer having in certain revenue cases a right to condemn goods, its judgment is conclusive against all the world that the goods so condemned were liable to seizure. "Where," said Lord Kenyon, in *Geyer v. Aguilar*, 7 T. R. 696, "there has been a proceeding in the Exchequer, and a judgment *in rem*, so long as the judgment remains in force it is obligatory upon the parties who have civil rights depending on the same question." See also B. N. P. 244, and *Scott v. Shearman*, 2 W. Bl. 977. And the very qualification of this rule furnishes the best illustration of the general principle; for, though the condemnation of the *goods* is thus conclusive, because it is a proceeding *in rem*, yet a conviction of the *person* committing the illegality, though by the same court and concerning the same transaction, is not so, because that is a proceeding *in personam*; *Hart v. Macnamara*, 4 Price, 154, n. As to the effect of an *acquittal* of goods in the Exchequer, see *Cooke v. Sholl*, 5 T. R. 255. (The jurisdiction of the Court of Exchequer was transferred by the Judicature Act, 1873, s. 16, to the High Court, but

s. 34 assigned to the Exchequer Division all causes and matters which, if that Act had not been passed, would have been within the exclusive cognizance of the Court of Exchequer, either as a Court of Revenue or as a Common Law Court. By an Order in Council, dated 16 Dec., 1880, the Exchequer Division was abolished and its jurisdiction vested in the Queen's Bench Division.)

Estoppel by
record.

So an order of sessions confirming an order of removal is said to be in the nature of a judgment *in rem*, and conclusive against all the world; but an order of the same court quashing an order of removal concludes only the contending parishes. See *R. v. Wick St. Lawrence*, 5 B. & Ad. 526, 534; *R. v. Clint*, 11 A. & E. 624, n.; *R. v. Evenwood*, 3 Q. B. 370.

Orders of
removal.

According to *R. v. Hartington*, 4 E. & B. 780, 794, an order of removal, not appealed against, or confirmed on appeal, "concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue." But Lord Selborne questioned this case in *R. v. Hutchings*, 6 Q. B. D., p. 303. See also *A.-G. for Trinidad v. Eriché*, (1893) A. C. 518. An order to wind up a company is not a judgment *in rem*, and does not prevent a stranger from showing that there was no jurisdiction to make the order; *Re Bowling and Welby*, (1895) 1 Ch. 663.

Winding-up
order.

The reader will sometimes find *dicta*, from which he might be induced to infer that, in order that a judgment *in rem* may have this binding effect, it must be the judgment of a court of *exclusive jurisdiction*. It is submitted, however, that this proposition cannot be maintained. The universal effect of a judgment *in rem* depends, it is submitted, on this principle, viz., that it is a solemn declaration, proceeding from an accredited quarter concerning the *status* of the thing adjudicated upon; *which very declaration operates accordingly upon the status of the thing adjudicated upon* and, *ipso facto*, renders it such as it is thereby declared to be. Thus a condemnation of goods in the Exchequer not merely declares the goods to be liable to forfeiture, but accomplishes the forfeiture accordingly. A sentence in the Prize Court not merely declares the vessel prize, but vests it in the captors. Now, when the *status* of the thing is thus altered, it seems to follow, as a necessary consequence, that the sentence altering it must conclude all the world; for

Judgment *in rem* need not
be of court of
exclusive
jurisdiction.

Estoppel by
record.

how vain would it be to try an issue, whether the thing be or be not as decreed, when the decree has already not only declared, but rendered it such! To this point tend the observations of the court in *Scott v. Shearman*, 2 W. Bl. 977, where the judgment *in rem* was held to be conclusive in the action, "because the property of the goods being changed, and irrevocably vested in the crown by the judgment of condemnation, it follows, as a necessary consequence, that neither trespass nor trover can be maintained for taking them in an orderly manner." And it is submitted that this must be Lord Coke's meaning, where he states, in 1 Inst. 352 b, that "where the record of the estoppel doth run to the disability or legitimation of the person, there all strangers shall take benefit of that record, as *outlawrie*, *excommengement*, *profession*, *attainder of præmunire*, &c., *felonie*, &c., *bastardie*, *muliertie*, and shall conclude the parties, *though they be strangers to the record*." In all these cases, it will be observed, the record operates upon the *status* of the individual. Thus judgment of *outlawrie* not merely declares the party an outlaw, but renders him so, and is, therefore, as it is submitted, a judgment *in rem*, and resembles the act of the Ecclesiastical Court depriving a man of his preferment or conferring on him the new character of an administrator. Now if this be the principle, it seems impossible to say that where the *status* of the thing is actually operated on, that operation shall be of less effect because some other court, had it been called upon, might have produced a similar one. It is admitted that it may happen that, after a court of competent jurisdiction has decreed *in rem*, some other court, proceeding likewise *in rem*, may pronounce a contrary decree on the same subject-matter. But it is submitted that such second court arrogates to itself a power of *appeal*, and that it is only viewed in the light of a judgment of a court of appeal that its decision can be looked upon as warrantable.

Judgment *in rem* only conclusive as to what is in question and material.

With regard to these judgments *in rem*, it is scarcely necessary further to observe that they, like all others, fall within the rules laid down by Comyns, C.B., above cited; and are conclusive as to nothing which might not have been in question, or was not material; *A.-G. v. King*, 5 Price, 195; *Concha v. Concha*, 11 App. Cas. 541.

Judgment of Court of Record *inter partes*.

Next with regard to the judgment of a court of record *inter partes*.

The great maxim which governs its effect is,—*Res inter*

alios acta alteri nocere non debet. The rule laid down in the celebrated judgment of De Grey, C. J. (in the *Duchess of Kingston's Case*) is, it will be recollected, that the judgment is conclusive between *the same parties*. In B. N. P. 232, the rule, and the reason for the rule, are stated to be that "the verdict ought to be between the same parties, because otherwise a man might be bound by a decision who had not the liberty to cross-examine; and nothing can be more contrary to natural justice, than that any one should be injured by a determination that he, *or those under whom he claims*, was not at liberty to controvert." To the same effect is Com. Dig. tit. *Estoppel*; Co. Litt. 352; and *Gaunt v. Wainman*, 3 B. N. C. 69; where Tindal, C. J., said: "According to Co. Litt., 352 a, 'every estoppel ought to be *reciprocal*, that is, to bind both parties; and this is the reason that, regularly, a stranger shall neither take advantage, nor be bound, by the estoppel.' It would be hard, indeed, if it were otherwise." See also *Doe v. Errington*, 6 B. N. C. 79; *Wenman v. Mackenzie*, 5 E. & B. 447; *Spencer v. Williams*, L. R. 2 P. & D. 230; *Concha v. Concha*, 11 App. Cas. 541; *R. v. Hutchings*, 6 Q. B. D. 300.

Estoppel by
record.

*Res inter
alios acta.*

The words above printed in italics, from the passage in Buller, give the proper expression of the extent to which estoppels are permitted under this rule. It would be hard, it is remarked, "that any one should be injured by a determination that he, *or those under whom he claims*, was not at liberty to controvert." There is, however, no hardship in holding that a man shall be bound by that which would have bound those under whom he claims *quoad* the subject-matter of the claim; for *qui sentit commodum sentire debet et onus*, and no man can, except in certain cases excepted by the statute law and the law merchant, transfer to another a better right than he himself possesses.

The record, therefore, of a verdict followed by a judgment in a suit *inter partes* will estop—

Who are
estopped.

1. *Parties*—and
2. *Privies* thereto—

One of the chief authorities as to the effect of a previous verdict in an action *inter partes* is *Outram v. Morewood*, 3 East, 346, where the principles and authorities on which this part of the law of estoppel depends are stated with great force, learning, and clearness, by Lord Ellenborough. The declaration against Morewood and Ellen his wife was in trespass, for breaking and entering the Cow Close, and

*Outram v.
Morewood.*

Estoppel by
record.

digging coal there. *Plea 2*: That on the 2nd Nov., 38 Eliz., Zouch was seised in fee of the *locus in quo*, and levied a fine to the use of R. and others in fee, who suffered a recovery to the use, as to the coal, of Zouch for eighty years, *si tamdiu vixerit*, remainder to Zouch jun. (his son) in tail male, remainder to Zouch jun. in fee; that Zouch sen. died, and that Zouch jun. conveyed by bargain and sale to J., T. and M. in fee; *that the coal mentioned in the declaration was part of the coal so bargained and sold*; and that Zouch jun. afterwards died without issue. Title was then *derived* from J., T. & M., to G. Morewood, who devised to the defendant Ellen in fee, and died seised, after which the defendant Ellen intermarried with the other defendant. Wherefore, &c. *Replication*: That the defendant ought not to be admitted to aver that the coal mentioned in the declaration was part of the coal bargained and sold, because, in E. 32 G. 3, the plaintiff sued the defendant Ellen in trespass for breaking and entering the same identical coal-mine: that she pleaded title as above, and averred that the coal in the declaration in that action mentioned *was part of the coal bargained and sold as aforesaid*: that the plaintiff traversed that averment; that issue was joined on that traverse, and the issue found for the plaintiff; and that judgment thereupon followed. And so the plaintiff prayed judgment, *si*, &c. *Demurrer and Joinder*.

The replication was held good. "The question," said Lord Ellenborough, "*is whether the defendants, the husband and wife, are estopped by this verdict, and judgment thereupon, from now averring, contrary to the title so there found against the wife, that the coal-mines now in question are parcel of the coal-mines bargained and sold by the indenture above mentioned.*" The operation and effect of this finding, if it operate at all as a conclusive bar, must be by way of estoppel. If the wife were bound by this finding, as an estoppel, and precluded from averring the contrary of what was then so found, the husband, in respect of his privity, either in estate or in law, would be equally bound, according to what is said in Co. Litt. 352 a, 'Privies in estate, as the feoffee, lessee, &c.—privies in law, as the lords by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come under by act in law, or in the *post*, shall be bound, and take advantage of estoppels.' The question then is, is the wife herself estopped by this former finding to aver the contrary? In Brooke, tit. *Estoppels*, pl. 15 (who cites 33

H. 6, 7, 19, 50 ; see also Bro. *Estate*, 158, 2 E. 4, 17), it is said to be 'agreed that all the records in which the freehold comes in debate shall be estopped with the land, and run with the land, so that a man may plead this as party, or as heir, as privy, or by que estate.' But if it be said that by 'the freehold coming in debate' must be meant a question respecting the same in a suit in which the freehold is immediately recoverable, as in an assize or writ of entry, I answer that a recovery in any one suit, upon issue joined on matter of title, is equally conclusive upon the subject-matter of such title, and that a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession." His lordship then cited a case reported in 3 Leon. 194, in support of the above view, and, after commenting upon the authorities relied upon as sustaining the contrary doctrine, and showing that none of them negatived the conclusiveness of a verdict found on any precise point once put in issue between the same parties or their privies, concluded by saying, "The cases adverted to by Lord Holt, and which have been fully explained and enforced by the defendant's counsel, together with the other authorities, on the subject of protestation and estoppel, cited from Bro. Abr. *Protestation*, pl. 9, Fitzherbert, *Estoppel*, pl. 20, are in our opinion, as well as upon the reason and convenience of the thing, and the analogy to the rules of law in other cases, decisive that the husband and wife, the defendants in this case, are estopped by the former verdict and judgment on the same point in the action of trespass, to which the wife was a party, from averring that the coal-mines now in question are parcel of the coal-mines bargained and sold by Sir John Zouch, and consequently that the plaintiff ought to recover."

Estoppel by
record.

See further, *Ward v. Wilkinson*, 4 B. & Ald. 410 ; *Simpson v. Pickering*, 1 C. M. & R. 527 ; and *Eastmure v. Laws*, 5 B. N. C. 444 ; from which last case it appears, as was indeed always clear on principle, that a verdict, negating the right of a defendant stated in his plea, estops him in a subsequent action from asserting that right as plaintiff against the same party. It was an action of debt, with the common counts for money had and received, money paid, and on an account stated. *Plea*, that, the defendant in this action having formerly sued the plaintiff, the latter pleaded his present demand by way of set-off, and a verdict was

Eastmure v.
Laws.

Estoppel by
record.

found against the set-off. *Replication*, that no evidence was offered in support of such plea of set-off. *Demurrer* thereupon. "The question," said Tindal, C.J., "is whether, after a precise issue on the same point has been found against the plaintiff, he may bring an action, and agitate the whole matter over again. . . . Consistently with the decision in *Outram v. Morewood*, I cannot see how an estoppel can be set aside on the ground set up by this replication."

Old doctrine
as to set-off.

That the principle on which *Eastmure v. Laws* was decided is a correct one there can be no doubt; but I confess it strikes me that there may be some doubt as to its applicability to that particular case, if the decisions were correct in *Tuck v. Tuck*, 5 M. & W. 109, and *Kilner v. Bailey*, Id., 382, viz., that a defendant is not entitled to a verdict on a plea of set-off, unless he proves so much of it as with the other defences on the record will constitute a defence to the entire action. The doctrine adhered to in those cases led to almost inextricable difficulties in replying to a plea of set-off where, for instance, part of the set-off had been paid and part was barred by the Statute of Limitations or an Insolvent Act; see the cases referred to, in argument, in *Francis v. Dodsworth*, 4 C. B. 202. These difficulties, however, were removed in most cases by the C. L. P. Act, 1852, s. 75, and the provisions, as to set-off and counterclaim, of the Judicature Acts, 1873, 1875, and the Rules of Court thereunder.

Counterclaim
in County
Court.

As to the effect of a counterclaim in a county court upon subsequent proceedings in respect of the same matter in a superior court, see *Webster v. Armstrong*, 54 L. J. Q. B. 236.

Party suing
in different
capacity not
estopped.

It must be observed that a verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and, in fact, is a different person in law; see *Robinson's Case*, 5 Rep. 32 b; Com. Dig., *Estoppel*, C.; *Bennett v. Gamgee*, 2 Ex. D. 11. In *Leggott v. G. N. R. Co.*, 1 Q. B. D. 599, this statement of the law was cited with approval by Quain, J. It was there held that, in an action brought by the plaintiff, as administratrix generally, the defendants were not estopped by the judgment in a previous action brought against them by the same plaintiff, suing as administratrix under Lord Campbell's Act; see also *Daly v. Dublin R. Co.*, 30 L. R. Ir. 514; *Wood v. Gray*, (1892) A. C. 576; and *post*, p. 746. In *Metters v. Brown*, 1 H. & C. 686, the Court of Exch. laid down the rule that "whenever a person sues, not in his own right, but in right

Personal re-
presentative.

of another, he must for the purpose of estoppel be deemed a stranger."

Estoppel by record.

A petition to revoke a patent is presented on behalf of the public, and is not personal to the petitioner; the respondent to such a petition is, therefore, not estopped from setting up the validity of the patent by a decision, in a previous action between him and the petitioner, that the patent was invalid; *Re Deeley's Patent*, (1895) 1 Ch. 687.

Petitioner for revocation of patent.

From the judgment in *Fishmongers Co. v. Robertson*, 5 M. & Gr. 131, 192, it would seem that the fact of a corporation suing even upon an *executory* contract not under seal *estops them by matter of record* from setting up the want of their common seal to the same contract in a cross action upon it. But that proposition was questioned in *Copper Miners v. Fox*, 16 Q. B. 229; in *Kidderminster v. Hardwick*, L. R. 9 Exch. 13; and also in *Boileau v. Rutlin*, 2 Exch. 665, where Parke, B., suggested as the correct rule, that pleadings are not to be treated as positive allegations of the truth of the facts stated therein for all purposes, but only as statements of the case of the party for the purposes of the suit, to be admitted or denied, and if denied to be submitted to judicial decision; and that, although material facts actually decided by an issue in any suit, or admitted, either directly, or indirectly (by taking a traverse on some other facts, which traverse is found against the party taking it), cannot be again litigated between the same parties, yet that the statements of a party in a pleading ought not to be considered for all purposes as admissions of the truth of the facts so stated. See further, as to this doctrine, in *Boileau v. Rutlin*, *supra*; *Buckmaster v. Meiklejohn*, 8 Exch. 634; *Burkitt v. Blanshard*, 3 Id. 89; *Marianski v. Cairns*, 1 Macq. 212; *Caird v. Moss*, 33 Ch. D. 22; *Re Walters*, 61 L. T. 872. In *Sandwich v. The Queen*, 10 Q. B. 571, a municipal corporation, having assessed compensation to a dismissed officer in obedience to a mandamus, were held to be estopped from disputing his right to compensation in a subsequent proceeding by mandamus to compel them to execute a bond for securing to him an increased amount of compensation awarded by the Treasury on appeal from their assessment.

Whether corporation suing on contract estopped from setting up want of common seal as defence to cross action on it.

With regard to the effect of the estoppel upon *privies*.—Privies are divided by Lord Coke into three classes:—

Effect of estoppel upon privies.

1. Privies in blood.
2. Privies in law.
3. Privies by estate.

Estoppel by
record.

The doctrine of estoppel, however, so far as it applies to persons falling under each of these three denominations, applies to them on one and the same principle; namely, that a party claiming *through* another is estopped by that which estopped that other respecting the same subject-matter. Thus, an heir, who is *privy in blood*, is estopped by a verdict against his ancestor through whom he claims; *Lock v. Norborne*, 3 Mod. 141. An executor or administrator, suing as such, is bound by a verdict against his testator or intestate to whom he is *privy in law*; *R. v. Hebden*, And. 389. Lord Coke tells us, in the passage cited by Lord Ellenborough in *Outram v. Morewood*, that "the lords by escheat, the tenant by the curtesy, the tenant in dower, and the incumbent of a benefice, shall be bound, and take advantage of estoppels;" Co. Litt. 352 a. It will have been seen that, in that very case, it was decided that a verdict against a wife binds her future husband. See also *per* Lord Kenyon, *R. v. York*, 5 T. R. 66, 72; but see *R. v. Grimes*, 5 Burr. 2598, 2601.

In *Spencer v. Williams*, L. R. 2 P. & D. 230, which was an administration suit in the Probate Court, the defendant was held not to be estopped by a decree made against him in a previous administration suit in Chancery, to which he and the mother of the present plaintiffs were parties, but not the present plaintiffs themselves. The latter claimed to be next of kin as children of their father, but not otherwise *through* their mother, and the court held therefore that, though as against her the defendant would have been estopped, he was not estopped as against the present plaintiffs, who were not parties to the former litigation and did not claim through any party to it.

Privies by
estate.

With regard to *privies in estate*.—It is apprehended that a verdict against the feoffor would estop the feoffee; and against the lessor, the lessee; *et sic de similibus*. See *Blakemore v. Glamorganshire Co.*, 2 C. M. & R. 133, where, however, the question was merely as to the admissibility of the verdict in evidence. And see the cases of *finés*, which proceeded on the same principle, being like judgments after verdict, *estoppels of record*; e.g., *Helps v. Hereford*, 2 B. & Ald. 242, and the authorities there cited.

Claim must be
acquired sub-
sequently to
verdict.

In *Doe v. Derby*, 1 A. & E. 783, 790 (which was also a case, not of estoppel, but of admissibility), Littledale, J., said: "A passage has been cited from Com. Dig. *Evidence*,

A. 5, where it is said that 'a verdict in another action, for the same cause, shall be allowed in evidence between the same parties. So it shall be evidence where the verdict was for one under whom any of the present parties claim.' But that must mean a claim acquired through such party *subsequently* to the verdict." Accordingly, a purchaser of land is not estopped, as being privy in estate, by a judgment recovered in an action against the vendor commenced *after* the purchase; *Mercantile Trust Co. v. River Plate Trust Co.* (1894) 1 Ch. 578, 595.

Estoppel by
record.

It need hardly be remarked that the effect of verdicts, whether upon parties or privies, altogether depends on the question *whether the same point was in issue*. A verdict between two parties upon one question can, of course, have no binding effect in an issue joined between them on another. (See B. N. P. 233.) Nor will the verdict be admissible, unless it appears clear that the same point actually *was* in issue. It is not sufficient that it *might have been so*. In *Outram v. Morewood*, *supra*, Lord Ellenborough, speaking of the verdict in *Evelyn v. Haynes*, said that it could not have been pleaded by way of estoppel, "because no issue was taken in the first action upon any precise point; which is necessary to constitute an estoppel thereupon in the second action."

Same point
must be at
issue.

In *Carter v. James*, 13 M. & W. 137, to an action of debt on an indenture whereby the defendant covenanted to pay 600*l.*, the defendant pleaded, by way of estoppel, a former action by the plaintiff upon a bond conditioned to secure the same sum, and that, to a plea in that action alleging a usurious agreement and that the bond had been given in pursuance thereof, the plaintiff had replied, traversing that the bond was given in pursuance of the said agreement, which had been found against him. Upon demurrer the plea in the present action was held bad, on the ground that the fact of a usurious agreement was not directly in issue in the former action, but only the question whether the bond had been given in pursuance of the agreement alleged. See also *Mondel v. Steel*, 8 M. & W. 858, 872; *Rigge v. Burbidge*, 15 Id. 598. It is observable that the attention of the court in *Carter v. James* was not called to the effect of the admission by pleading over in the former action, the verdict on the issue having been found against the plaintiff, and a protestation being therefore ineffectual to prevent his being bound by the admission implied from pleading over. See

Carter v.
James.

Estoppel by
record.

also *Boileau v. Rutlin*, 2 Exch. 665; *Hutt v. Morrell*, 3 Exch. 240; *Whittaker v. Jackson*, 2 H. & C. 926; *Worman v. Worman*, 43 Ch. D. 296.

Omission to
set up defence
in previous
action.

The omission of a defendant to set up a defence in an earlier action does not estop him from setting it up in a later action brought by the same plaintiff, provided that such defence is not inconsistent with any traversable averment made by the plaintiff in the earlier action; *Howlett v. Tarte*, 10 C. B. N. S. 813; see also *Davis v. Hedges*, L. R. 6 Q. B. 687, explained in *Caird v. Moss*, 33 Ch. D. 22, 35; and *Hindley v. Haslam*, 27 W. R. 61.

Newington v.
Levy.

Where, however, the plaintiff sued upon a bill of exchange, and the defendant pleaded a composition deed containing a release conditional on payment of an instalment which became due after the date of the plea, and the plaintiff, after the instalment became due and was not paid, did not reply but confessed the plea and took his costs, he was held estopped from setting up, in a fresh action, the non-payment of the instalment; *Newington v. Levy*, L. R. 6 C. P. 180. But, in the subsequent action of *Hall v. Levy*, 10 Id. 154, which was between the same parties on the same bill, it was held a good replication, to a plea setting up the former proceedings and judgment, that, after those proceedings and before the second action, a second instalment had become due and the defendant had made default. See also *Heath v. Weaverham*, (1894) 2 Q. B. 108.

Hall v.
Levy.

Jewsbury v.
Mummery.

Where an executor, a defendant, in support of a plea of non-devastavit, sought to give evidence of facts, which, if a defence at all, might have been given in evidence under his plea of plene administravit in a previous action against him by the same plaintiff, in which judgment was given against him, he was held estopped; *Jewsbury v. Mummery*, L. R. 8 C. P. 56; see also *Ex p. March*, 67 L. T. 594.

Point need
not have been
the only one
at issue.

Nor form of
action the
same.

It is not necessary that the point on which it is sought to estop should have been *the only one in issue* on the previous occasion; it is enough if it be one which *must* have been decided; *R. v. St. Pancras*, 1 Peake, 220. Nor need the form of action be the same in each case; *Cleve v. Powel*, 1 M. & Rob. 228; *Hitchen v. Campbell*, 2 W. Bl. 827, 830 (a case on the admissibility of a verdict in evidence, but the principle is the same); see also *Routledge v. Hislop*, 2 E. & E. 549. In *Flitters v. Allfrey*, L. R. 10 C. P. 29, a tenant sued his landlord for a wrongful eviction and the landlord was held estopped by a previous judgment against him in a county

court. He had there sued the tenant for rent upon an alleged agreement of tenancy which, if established, would have been fatal to the tenant's claim for eviction. The existence of this agreement, however, the tenant had disputed in the county court, and the judgment had there been in his favour. The landlord was therefore held estopped from again setting up the agreement in the second action. The county court record only showed that the landlord's then claim was for rent and that the judgment was for the tenant, but evidence to explain the judgment was held admissible in the second action; see *Houstoun v. Sligo*, 29 Ch. D. 448.

Estoppel by record.

Evidence admissible to explain record.

In *Dover v. Child*, 1 Ex. D. 172, it was held that a refusal by a magistrate of an order to deliver up goods under 2 & 3 Vict. c. 71, s. 40, was no bar to an action by the applicant in trover; for "the magistrate's decision," said Cleasby, B., "is not like a judgment, because it appears by the proviso that the defendant may question it." Nor is the magistrate's order for a return of the goods a bar to an action for special damages for their detention; *Mid. R. Co. v. Martin*, (1893) 2 Q. B. 172.

A decision under 2 & 3 Vict. c. 71, s. 40, no bar.

In considering the question how far matters which have already been in controversy before legal tribunals can again be agitated in subsequent legal proceedings, reference must be made to *Phillips v. Ward*, 2 H. & C. 717; and *Nelson v. Couch*, 15 C. B. N. S. 99.

To support plea of *res judicata* the former suit must have concluded claim in later one.

In *Phillips v. Ward*, the defendants, being sued as joint debtors, pleaded by way of estoppel that they had been liable jointly with B. and not otherwise, and that in a former action brought by the same plaintiff against B. for the same debt, judgment had been given in B.'s favour. The plea was held bad, because it did "not show that the former action was successfully resisted on some ground common to all the joint debtors."

In *Nelson v. Couch*, which was an action for damages in respect of a collision between the plaintiff's and the defendant's ships, the defendant pleaded that the plaintiff had, by previous proceedings in the Admiralty Court in respect of the same collision, established a maritime lien against the defendant's ship, and obtained a decree against her under which she had been sold and the proceeds paid to the plaintiff. But, as it also appeared that the damages claimed in the action exceeded the amount recovered in the Admiralty Court, the pleas were held to be bad. Hardly consistent

Nelson v. Couch.

Estoppel by
record.

Wright v.
London Gen.
Omnibus Co.

with this principle seems the decision in *Wright v. London General Omnibus Co.*, 2 Q. B. D. 271. In that case, it was held that where a magistrate had, under 6 & 7 Vict. c. 86, s. 28, awarded by way of compensation to a party aggrieved the full sum which under the Act he was empowered to award, such party, having taken such sum with a protest that it was insufficient, was barred thereby from any subsequent action. The cases may, however, be reconciled by giving that Act the construction that it was intended that any such sum, if taken at all, should be taken in full compensation. The case was taken to the C. A. but was eventually struck out, the plaintiff failing to give security for costs.

Libel.

In an action for libel in respect of statements in a pamphlet containing a report of an action, the jury found that the report was fair, accurate, and honest, and was published without malice, and judgment was entered for the defendant. The plaintiff having brought a subsequent action in respect of the same publication, relying on other statements than those complained of in the claim in the former action, it was held that the matter was *res judicata*; *Macdougall v. Knight*, 25 Q. B. D. 1.

Replevin.

In *Gibbs v. Cruikshank*, L. R. 8 C. P. 454, judgment recovered in an action of replevin was held a bar to an action for trespass to the same goods, but not to an action for trespass to the land whereon they were, because the action of replevin had no relation to the latter action.

Damage to
person and
property.

Brunsdon v.
Humphrey.

In *Brunsdon v. Humphrey*, 14 Q. B. D. 141, the C. A. held (Lord Coleridge *diss.*) that, where the defendant had driven negligently into the plaintiff's cab, the recovery of damages for injury to the cab by the plaintiff in one action was no bar to his recovering damages in a second action for injuries to his person, though the damage in each case was caused by the same act of negligence; the ground being, that the infringement of separate rights gives rise to separate causes of action, but that, where there is but one cause of action, damages must be assessed once for all. In *Daly v. Dublin R. Co.*, 30 L. R. Ir. 514, it was held by the C. A. in Ireland that an executrix, who had brought an action under Lord Campbell's Act and recovered damages, was not estopped from bringing a subsequent action for damage to the personal estate of the deceased caused by medical expenses and loss from inability to attend to business. See *Wood v. Gray*, (1892) A. C. 576; and *ante*, p. 740. See also *Serrao v. Noel*, 15 Q. B. D. 549; *Clarke v. Yorke*, 52 L. J. Ch. 32.

Daly v.
Dublin R. Co.

When a bankruptcy petition founded upon non-compliance with the terms of a bankruptcy notice has been heard and dismissed upon the ground that the judgment debt was not a good petitioning creditor's debt, the same creditor may serve a second bankruptcy notice in respect of the same judgment debt and present a second petition founded upon non-compliance with the second notice; *Re Vitoria*, (1894) 2 Q. B. 387.

Estoppel by record.

Dismissal of bankruptcy petition.

A judgment by consent, or default, raises an estoppel just in the same way as a judgment after the court has exercised a judicial discretion in the matter; *The Bellicairn*, 10 P.D. 161; *Re South American Co.*, (1895) 1 Ch. 37, where *Jenkins v. Robertson*, L. R. 1 H. L. Sc. 117, was explained.

Judgment by consent or default.

See also as to *res judicata*, *Phosphate Sewage Co. v. Molleson*, 4 App. Cas. 801; and for some important observations on the subject in the H. L., *Lockyer v. Ferryman*, 2 Id. 519.

As to the effect of judgment recovered against one of several joint debtors in barring an action against the others, see *Kendall v. Hamilton*, 4 App. Cas. 504; *Re Hodgson*, 31 Ch. D. 177; *Hammond v. Schofield*, (1891) 1 Q. B. 453; *Beck v. Pierce*, 23 Q. B. D. 316; *Hoare v. Niblett*, (1891) 1 Q. B. 781; *Weall v. James*, 68 L. T. 515; *Wegg Prosser v. Evans*, (1895) 1 Q. B. 108.

Judgment against one joint debtor.

Having thus barely touched upon the question, between whom is the record an estoppel, and the circumstances under which the estoppel exists, it appears right to devote a few words to the inquiry, *in what manner is the estoppel, where it exists, to be made available?* or in other words, *Is it to any and what extent necessary that the estoppel should be pleaded?* and the following discussion may yet be found of utility, notwithstanding the changes in pleading introduced by the Judicature Acts; although in most, if not all, cases it would now be, it is submitted, necessary under R. S. C., O. XIX., r. 15, to plead the facts giving rise to the estoppel. See *Robinson v. Robinson*, 2 P. D. 75; and *Edevain v. Cohen*, 43 Ch. D. 187.

Pleading. Whether to be conclusive estoppel must be pleaded.

Now, upon this question an opinion has prevailed that, in order to render a verdict *conclusive* by way of estoppel, it must be pleaded as such, although without being pleaded it might be *admissible* in evidence. This opinion seems to have originated in the language of *Goddard's Case*, 2 Co. 4b. In that case, Goddard, administrator of Newton, brought an action against Denton on a bond made to his intestate, dated 4th April, 24 Eliz. The defendant pleaded that the

Goddard's Case.

Estoppel
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conclusive
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be pleaded.

Decision in
Goddard's
Case does not
involve the
point.

intestate died before the date of the bond, and so that it was not his deed; on which the plaintiff took issue; and the jury found specially that the bond was delivered on the 30th July, 23 Eliz., by the defendant, but that the intestate died before the date of the bond; and the court gave judgment for the plaintiff.

This *decision*, it is obvious, does by no means necessarily involve the point under discussion, for the *date* was immaterial to the issue joined on *non est factum*; and Lord Coke, in the same case, expressly tells us that, had the deed had an impossible date, it would still be good and take effect by the delivery. Now, if the deed might be the defendant's deed, and yet the date impossible, it follows that the impossibility of the date could not estop the plaintiff in an issue joined on *non est factum*. But Lord Coke states that "the reason of their judgment was that, although the obligee in pleading cannot allege the delivery before the date, as it was adjudged in 12 Hen. 6, 1, which case was affirmed to be good law, because he is estopped to take an averment against anything expressed in the deed; yet the jurors, who are sworn to say the truth, shall not be estopped; for an estoppel is to conclude one to say the truth, and therefore jurors cannot be estopped, *because they are sworn to say the truth*." It must, however, be observed, that the jurors are *not* sworn to say the truth, but a true verdict to give according to the evidence. Now, an estoppel precludes the party estopped from offering any evidence to the contrary, and it is difficult to see in what manner the oath of a juror can be opposed to the rule that a record shall prevent the party against whom it is offered in evidence from producing other evidence to controvert it, and that, all the evidence being thus one way, namely, *with the record*, the jury shall be bound to give their verdict for the party with whom all the evidence is, and against the party in whose favour there is *no* evidence.

Cases in which
records and
deeds treated
as conclusive
when pro-
duced in
evidence,
though not
pleaded.

The *doctrine* in *Goddard's Case* is cited without any remark in B. N. P. 298 b. But, notwithstanding, several cases occurred in which records and deeds seem to have been treated as *conclusive* when produced in evidence, though not pleaded. The expressions of De Grey, C.J., in the *Duchess of Kingston's Case*, will be found to be to that effect. The judgment, his lordship says (p. 714), "is, as a plea, a bar, or, as evidence, *conclusive*." In *Aslin v. Parkin*, 2 Burr. 665, the judgment in the action of ejectment is expressly stated to be conclusive in the subsequent action for mesne

profits. See also *R. v. St. Pancras*, 1 Peake, 220 (where a conviction against a parish for non-repairing was held *conclusive evidence* of liability upon a subsequent indictment); *Strutt v. Bovington*, 5 Esp. 57; and *Hitchen v. Campbell*, 2 W. Bl. 827, 830. (It may be observed that a verdict of guilty and judgment thereon on an indictment for obstructing a public highway could not, under the system of pleading before the Judicature Acts, be *pleaded* as an estoppel in an action brought by the party convicted against a third person for using the way, on account of the difference of parties; *Petrie v. Nuttall*, 11 Ex. 569.)

Estoppel by record.

Whether to be conclusive estoppel must be pleaded.

At length came *Vooght v. Winch*, 2 B. & Ald. 662, on which is mainly founded the doctrine that seems to have obtained, viz., that the estoppel to be conclusive must be pleaded. There the declaration stated that the plaintiff was entitled to a mill and the benefit of a stream, and that the defendant widened and deepened a ditch leading out of the stream, and thereby diverted water from, and damaged, the mill. The plea was, not guilty. At the trial, the defendant gave in evidence the record of a former action for the same cause between the same parties, in which the plea had been the same, and the verdict for the defendant. The former action was commenced in 1817. The declaration in the present action stated that the grievances were committed on 1 June, 1814, and on divers days between that day and the commencement of the action. The judge refused to hold that the record of this verdict was conclusive evidence against the plaintiff, and the court thought he was right in so holding.

Vooght v. Winch.

It was assumed that the verdict would have been conclusive if pleaded. Whether it would have been so or not is perhaps therefore scarce worth inquiring. Possibly, had it been pleaded by way of estoppel, the plaintiff would have urged on a demurrer that, for aught that appeared, the former verdict might have proceeded, not on the question of right, but on the fact that the defendant had *then* committed no disturbance at all, and that such a verdict could not be conclusive in the present action; for that although he had not *then*, yet he might have *since* committed an actionable disturbance. (See *Few v. Backhouse*, 8 A. & E. 789; *Palmer v. Temple*, 9 Id. 508; *Bristowe v. Fairclough*, 1 M. & Gr. 142.) However, the defendant urged that the former verdict would have been conclusive by way of estoppel, if so pleaded. The bench assumed throughout their judgment

Estoppel by record.
Whether to be conclusive estoppel must be pleaded.

Judgment in ejectment.
Action for mesne profits.

that it would have been so, and their judgment proceeded on that assumption. "I am of opinion," said Abbott, J., "that the verdict and judgment obtained for the defendant in the former action was not conclusive evidence against the plaintiff on the plea of not guilty. It would, indeed, have been conclusive if pleaded in bar to the action by way of estoppel."

On the authority of *Vooght v. Winch* was decided *Doe v. Huddart*, 2 C. M. & R. 316, where the Court of Exch. held that a judgment in ejectment, not having been pleaded as an estoppel, was not conclusive in the action for mesne profits. And see *Matthew v. Osborne*, 13 C. B. 919. That it was conclusive, before the C. L. P. Acts, when pleaded by way of estoppel, was decided in *Doe v. Wright*, 10 A. & E. 763. And the same seems to be the law under the pleadings in ejectment under the Judicature Acts, though it was held otherwise in a case under the C. L. P. Act, 1852; see *Harris v. Mulkern*, 1 Ex. D. 31. As to the mode of framing the plea under the forms of pleading prior to the C. L. P. Act, 1852, see *Doe v. Wellsman*, 2 Exch. 368; *Wilkinson v. Kirby*, 15 C. B. 430.

It is submitted that the cases of *Vooght v. Winch* and *Doe v. Huddart* are by no means at variance with the doctrine of De Grey, C.J., viz., that a judgment on the same point between the same parties is in pleading a bar, *in evidence conclusive*. And it is submitted that the true meaning of this is, that it is conclusive as a plea *where there is an opportunity of pleading it*, but that *where there is no such opportunity, then it is conclusive as evidence*: and that *Vooght v. Winch* and *Doe v. Huddart* merely decided that a party may waive the benefit of an estoppel, and that he elects to waive it by not pleading it when he has an opportunity of doing so. See *Nordon v. Levy*, 31 W. R. 720.

Vooght v. Winch, &c., only decide that estoppel may be waived by not pleading it.

Magrath v. Hardy.

This doctrine is propounded with some confidence, because it was the doctrine of the court in *Trevivan v. Lawrence*, of which the Common Pleas approved in *Magrath v. Hardy*, 4 B. N. C. 782, where the estoppel was held to be waived, the defendant having omitted to plead it as he might have done.

Trevivan v. Lawrence.

In an elaborate and considered judgment, Tindal, C.J., commented on this subject as follows:—"The law on this point is laid down with great distinctness in the case of *Trevivan v. Lawrence*. 'The court,' it is said, 'took this difference, that where the plaintiff's title is by estoppel and the defendant pleads the general issue, the jury are bound by the estoppel; for here is a title in the plaintiff that is a

good title in law, and a good title if the matter had been disclosed and relied on in pleading. But, if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for then they are to find the truth of the fact which is against him. Thus, in debt for rent on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture and estopped him; but if the defendant plead *nihil habuit*, &c., and the plaintiff will not rely on the estoppel but reply *habuit*, &c., he waives the *estoppel*, and leaves it at large, and the jury shall find the truth notwithstanding the indenture.''' (See *ante*, p. 725.) And his lordship proceeded to state that the judgment of the court, standing on this ground, was distinguishable from the cases cited at the bar, in which the *estoppel* had been held available.

Estoppel by record.

Whether to be conclusive estoppel must be pleaded.

In *Feversham v. Emerson*, 11 Exch. 385, the Court of Exch. held that a replication by way of estoppel may be pleaded to a plea of *liberum tenementum*, but that, if the plaintiff merely joins issue on the plea and does not reply such estoppel, the facts which might have been so replied are not conclusive evidence in his favour, but only constitute evidence to go to the jury. (See, as to when a judgment *in rem* is conclusive evidence as to the title to goods and need not be pleaded, *Cammell v. Sewell*, 3 H. & N. 617, 5 Id. 728; *post*, p. 786.)

Feversham v. Emerson.

Adopting this distinction, it is submitted that all the decisions may be reconciled, for, as to *Vooght v. Winch*, that case proceeded on the express ground that *the defendant might have pleaded the estoppel*, on which circumstance each of the judges will be found to have expressly relied. In *Doe v. Huddart*, the prior judgment in ejectment might have been replied; for, though before the rules of Hil., 1834, the plea of "*not guilty*" in trespass put the whole title in issue as well as the taking of the profits, and, therefore, where that plea was pleaded, the *estoppel* could not be replied, since it was uncertain whether the defendant meant to deny the plaintiff's title, on which alone he was concluded by the record of the ejectment, or to deny merely the taking of the profits (and for this reason in *Armstrong v. Norton*, 2 Ir. L. R. 96, the prior judgment was held by the Court of Exch. in Ireland, where the new rules of

Decisions may be reconciled.

Estoppel by record.

Whether to be conclusive estoppel must be pleaded.

pleading did not prevail, to be estoppel in evidence, though not pleaded); yet, as soon as by the rules of Hil., 1834, the issue of *not guilty* was narrowed and the plea that *the plaintiff never was possessed* became a usual one, the record in ejectment became pleadable in reply to that plea by way of estoppel; *Doe v. Wright*, 10 A. & E. 763; and, of course, according to the rule in *Hardy v. Magrath*, and *Trevivan v. Lawrence*, could not be conclusive in evidence, and was properly decided in *Doe v. Huddart* not to be so. *Dimes v. Grand Junction Canal Co.*, 9 Q. B. 469, *accord*. The same observation disposes of *Bowman v. Rostron*, 2 A. & E. 295, where a recital in a deed which might have been pleaded was held to be no *estoppel* in evidence.

If the law of estoppel be founded on justice and good sense—if it be true that *nemo debet bis vexari pro eâdem causâ*—it would be strange to say that the accidental form of an issue should deprive a party of the benefit of it, and force him to litigate the same question twice over.

Former judgment, if erroneous, must be set aside.

It seems that the circumstance that the former judgment was erroneous, either absolutely, or in awarding an inadequate amount to the successful party, cannot, so long as that judgment stands unreversed by a competent court, be set up in answer to its effect by way of conclusion; *Overton v. Harvey*, 9 C. B. 324; *Todd v. Stewart*, 9 Q. B. 759; *Huffer v. Allen*, L. R. 2 Ex. 15; *Serrao v. Noel*, 15 Q. B. D. 549; *Clarke v. Yorke*, 31 W. R. 62. See *ante*, p. 730. But where a judgment roll, as made up by the plaintiff for the purposes of a subsequent suit in equity, did not accurately represent what had been found at the trial, the Privy Council held that the defendant was not estopped, in the suit, from showing what the real findings had been; *Want v. Moss*, 70 L. T. 178. As to getting rid of the effect of a judgment in another suit by pleading that it was obtained by a fraud upon the court, see *post*, p. 770.

As to the effect upon an English action of a judgment obtained in Ireland in an action in respect of the same matter, which was commenced there after the commencement of, but before judgment in, the English action, see *Houstoun v. Sligo*, 29 Ch. D. 448.

Estoppels quasi of record.

Besides the judgments of courts of record there are certain other judicial proceedings which possess a conclusive effect, though not emanating from a court, strictly speaking, of record. I propose to mention one or two of these, which may perhaps without impropriety be designated as:—

Estoppels quasi of Record.

Estoppels
quasi of
record.

It must be observed that by the Judicature Act, 1873, s. 16, the jurisdiction of the High Court of Chancery, of the Courts of Probate and for Divorce and Matrimonial Causes (to which latter courts the jurisdiction of Ecclesiastical Courts over Probate and Matrimonial and Divorce Causes had already been transferred), and of the High Court of Admiralty, is transferred to the High Court of Justice, which is thereby made a Superior Court of Record. So that the decisions of the Divisions of that Court dealing with these matters, now stand, it is presumed, upon the same footing as the decisions of the Divisions representing the Courts of Common Law, and are judgments of record.

Judicature
Act makes
certain judg-
ments, for-
merly *quasi*
of record, now
of record.

Decrees of the *High Court of Chancery*, which, although a superior court, seems not to have been, at least, upon its equity side, a court of record (see Co. Litt. 260), have stood, nevertheless, on the same level with judgments of the three superior courts of common law. It is laid down in B. N. P. 243, that "a decree in Chancery may be given in evidence between the same parties, or any claiming under them, for their judgments must be of authority in those cases where the law gives them a jurisdiction; for it were very absurd that the law should give them a jurisdiction and yet not suffer what is done by force of that jurisdiction to be full proof." In the *Manchester Mills' Case*, 1 Dougl. 222, n. 13, it was laid down by Lord Mansfield, that a decree establishing a custom to send corn to be ground at a particular mill ought not to be controverted nor the existence of the custom litigated any further before a jury; and that such decree bound all persons of the same description with the original defendants. See also *Trotter v. Blake*, 2 Mod. 229; and *Robinson v. Duleep Singh*, 11 Ch. D. 798, and *Re May*, 28 Id. 516, decided since the Judicature Acts. A decree by consent in an amicable suit seems to have an additional claim to be considered final; see *Allason v. Stark*, 9 A. & E. 255; *Hopetoun v. Ramsay*, 5 Bell, App. 69. As to the effect of the dismissal of a bill in equity relating to matters subsequently litigated at law, see *Collins v. Cave*, 27 L. J. Ex. 146.

Decrees in
Chancery.

Judgments of the *Courts Ecclesiastical* are of two sorts—*in rem* and *inter partes*. A grant of probate or of administration is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character

Judgments of
Courts Eccle-
siastical.

Grant of pro-
bate, a deci-
sion *in rem*.

Estoppels
quasi of
record.

Allen v.
Dundas.

which it declares to belong to him. Accordingly, such grant is conclusive against all the world; *Noell v. Wells*, 1 Lev. 235, 6. It may, indeed, be shown that the grant was revoked, for that is the further act of the same court, or that it was forged, for that shows it not to be the act of the court at all, or that it was granted by a court having no jurisdiction, for then it is a nonentity. But it cannot be shown that the testator was mad, or that *the will* was forged, for those facts might have been alleged in opposition to the grant of probate or administration; *Noell v. Wells, supra*.

On this ground it was that the Queen's Bench in *Allen v. Dundas*, 3 T. R. 125, held that payment of money to an executor who had obtained probate of a forged will, which was afterwards repealed, is a discharge to the party paying it; since, the probate being conclusive evidence of the executorship as long as it remained unrepealed, the debtor would, when he was called upon to pay, have had no defence against an action brought by the executor under the forged will. Buller, J., in that case said, "The first question to be considered is, *what is the effect of a probate?* It has been contended, first, that it is not a judicial act; and secondly, that it is not conclusive. But I am most clearly of opinion that it is a judicial act; for the Ecclesiastical Court may hear and examine the parties on the different sides, whether a will be or be not properly made. That is the only court which can pronounce whether or not the will be good; and the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive till it be repealed; and no court of common law can admit evidence to impeach it. Then, this case was compared to a probate of a supposed will of a living person; but in such a case the Ecclesiastical Courts have no jurisdiction, and the probate can have no effect: their jurisdiction is only to grant probate of the wills of *dead* persons. The distinction in this respect is this,—if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places: if they have no jurisdiction, their whole proceedings are a nullity." And inasmuch as "if a testator be circumvented by fraud the testament loseth its force," and that may be set up as an objection to the grant of probate of that part of the will which is affected by the fraud, the H. L. held, against the opinions of Lord Cottenham and Lord Langdale, in *Allen v. McPherson*, 5 Beav. 469, 1 Phil. 133, 1 H. L. C. 191, that after a will and

Allen v.
McPherson.

codicils had, in a contested suit, been admitted to proof in the Ecclesiastical Court, the Court of Chancery had no jurisdiction either to set aside one of the codicils for fraud alleged to have been practised upon the testator, or to declare the persons who were alleged to have been guilty of the fraud, and to have thereby reaped a benefit for themselves by inducing the testator to alter his will in their favour, trustees for the persons whom they had induced the testator to cut off. The opinion of the majority of the Lords in that case seems to have been that, independently of the prior determination in the Ecclesiastical Court, the Court of Chancery had no jurisdiction in the matter; and that opinion was acted upon by the C. A. in *Meluish v. Milton*, 3 Ch. D. 27.

Estoppels
quasi of
record.

It must be remembered, however, that though probate would be conclusive of an instrument being testamentary, "it would be conclusive of nothing more, for after that there would then arise the question, how is the court that is to administer the property to ascertain who is entitled to it? For that purpose you must look beyond the probate to know in what country the testator was domiciled, for by the law of that country the property must be administered;" see *per* Lord Cranworth, in *Whicker v. Hume*, 7 H. L. C. 124, 156; cited by Lord Herschell, in *Concha v. Concha*, 11 App. Cas. 541, 551.

But conclu-
sive only as to
instrument
being testa-
mentary.

On the same principle, a sentence in a matrimonial suit is conclusive, for it is an adjudication upon the *status* of the parties; see *Da Costa v. Villa Real*, 2 Str. 961; *Bunting's Case*, 4 Co. 29; *Kenn's Case*, 7 Id. 42 b; *Meddowcroft v. Huguenin*, 4 Moo. P. C., 386; *Perry v. Meddowcroft*, 10 Beav. 122; and see the instances of sentences of deprivation collected by Lord Holt in *Philips v. Bury*, 2 T. R. 346.

Sentence in
matrimonia
suit, a decision
in rem.

But it is otherwise when the suit is for a jactitation of marriage; for there the spiritual court does not intend to affect the *status* of the parties by its decree, but merely to prevent one party from falsely asserting that a marriage happened under certain specified circumstances. See *The Duchess of Kingston's Case*, *ante*, pp. 719, 720; and *quære* as to *Jones v. Bow*, Carth. 225.

But not in
suit for
jactitation of
marriage.

So, in an action against a husband for necessaries supplied to his wife, it was held that the finding of a jury in the Divorce Court that the wife had been guilty of adultery was no defence to the husband as putting an end to the wife's agency to bind him; there having been no decree by

Nor finding of
jury in
Divorce Court
where no
decree.

Estoppels
quasi of
record.

Not conclu-
sive as to
matters which
may or may
not have been
controverted.

Impeachable
for fraud.

Whether
decree of
spiritual court
conclusive in
criminal pro-
ceeding.

R. v. Buttery.

R. v. Grundon.

the court of dissolution of marriage so as to alter the status of the parties; *Needham v. Bremner*, L. R. 1 C. P. 583. (See *ante*, p. 483.)

It need hardly be added, that such sentences do not, any more than the records of the superior courts, conclude as to matters which may or may not have been controverted; see *Blackham's Case*, 1 Salk. 290; *R. v. Wye*, 7 A. & E. 761, 772; *R. v. Hartington*, 4 E. & B. 780; *Hindley v. Haslam*, 27 W. R. 61; *Concha v. Concha*, 11 App. Cas. 541; or that such sentences may be impeached on the ground of collusion between the parties, and fraud practised thereby upon the court; *Meddowcroft v. Huguenin*, *Perry v. Meddowcroft*, *supra*.

It is laid down in *The Duchess of Kingston's Case* (p. 717) that the decree of the spiritual court is not conclusive in a criminal proceeding; and this is stated to be upon grounds of public policy. It seems difficult, however, to support this view on principle. A sentence in the spiritual court *inter partes* could not indeed be conclusive in a criminal proceeding, because the parties litigant would not have been the same in both courts. But it is difficult to see how a decree *in rem*, which operates upon the *status* of the individual and *renders* the fact what the court adjudicates it to be—it is difficult, I say, to see how such a sentence can be otherwise than conclusive. In *The Duchess of Kingston's Case*, it was unnecessary to decide this point, the sentence being *in personam*. In *R. v. Buttery*, R. & R. C. C. 342, a probate was held not to be conclusive evidence that the party who had obtained it had not forged the will, which may at first sight seem inconsistent with the doctrine in *Noell v. Wells*, 1 Lev. 236, above cited; viz., that the party in a civil action cannot avoid the probate by showing the will to be forged. But, on consideration, the cases will appear to be consistent; for, in the civil suit, the evidence is offered for the purpose of showing that the party who obtained probate *did not thereby become executor*, which character the special court has adjudged him to possess; but, in the criminal case, the party offering the evidence admits the probate to be valid till repealed, admits the defendant to have thereby become executor, but merely seeks to show what means he used in order to become so, which is no more than if he sought to prove that in the affidavit in which the prisoner verified the scripts he had committed perjury. On the other hand, in *R. v. Grundon*, 1 Cowp. 315, a sentence of expulsion from a college was

held conclusive in answer to an indictment for an assault, on the express ground that it resembled a sentence of the spiritual court.

Estoppels
quasi of
record.

In *R. v. Vincent*, 1 Str. 481, indeed, the doctrine of the conclusiveness of the sentence was carried to a greater extent, and it seems to be impossible to support that case consistently with *R. v. Buttery*, and *R. v. Macnamara*, R. & R. C. C. 342; the latter decisions are those which must be now regarded as law, being not only later in date, but the decisions of nine judges; whereas *R. v. Vincent* was decided by King, C.J., alone.

The proposition that a judgment *in rem* is conclusive in a criminal proceeding may, at first sight, appear to involve hardship, but will not, I think, appear to do so when we shall have fully considered the manner in which its effect is limited by holding it conclusive only on the point decided.

As to the effect of the decree of a spiritual court in estopping the parties to the suit, with respect to a question incidentally determined therein, from opening up the same question in another court in a suit having a different object, much discussion arose in the case of *Barrs v. Jackson*, 1 Y. & C. 585, 1 Phil. 582. In that case Lord Lyndhurst, reversing a decretal order of Knight Bruce, V.-C., held the sentence of an Ecclesiastical Court in a suit for *administration*, turning upon the question which of the parties was next of kin to the intestate, to be conclusive upon that question in a subsequent suit in the Court of Chancery between the same parties for *distribution*. Lord Lyndhurst's judgment was based upon the ground that in *Bouchier v. Taylor*, 4 Bro. P. C. 708, Hargrave's Law Tracts, 473, the H. L. had decided "that the Court of Chancery in exercising its concurrent jurisdiction as to distribution was concluded by sentences of the spiritual courts in granting administration, and not at liberty to re-examine the points decided in the exercise of that peculiar jurisdiction." But it must be remembered that at the time of that decision the Spiritual Court was "a court of distribution, *as well as* a court merely to determine the question of the validity of the testament, and to grant probate or administration; it was a court of distribution concurrently with the Court of Chancery." See this distinction explained by Lord Herschell in *Concha v. Concha*, 11 App. Cas. 541, 556. In the last case the H. L., affirming the decision of the C. A., held that a finding by Sir C. Cresswell as to the *domicil* of a

How far a
point inci-
dentally
determined in
Ecclesiastical
Court an
estoppel.

Barrs v.
Jackson.

Concha v.
Concha.

Estoppels
quasi of
record.

testator, in a suit propounding his will, was not binding as an estoppel in subsequent proceedings for the administration of the estate between A. Concha (who had disputed the validity of the will in the probate suit) and the executors; their lordships pointing out that the finding as to the testator's domicile was immaterial in the probate suit. "The scope of the probate suit," said Bowen, L.J., in the C. A., 29 Ch. D. 304, "is to establish that the will was executed in conformity with the law of the country of domicile, wherever that country was; but if it is not necessary for the purpose of such a suit to establish an English domicile more than a Chilian, the executors could not, either by litigating an incidental question, or by admissions they might choose to make about it, conclude the residuary legatee as to the extent to which the testator's will when proved will operate on property alleged by an adverse claimant to be outside his power of testamentary disposition. And as the residuary legatee could not be bound under such circumstances by a decision against the executors as to domicile, he cannot, since estoppels are mutual, treat as binding a decision in their favour."

Judgment of
Knight Bruce,
V.-C., in
Barrs v.
Jackson.

The principles laid down in the judgment of Knight Bruce, V.-C., in *Barrs v. Jackson*, are wholly untouched by its reversal (see *per* Lord Selborne, in *R. v. Hutchings*, 6 Q. B. D., p. 304), and that judgment presents a very full and clear statement of the law of estoppel by adjudication in a former suit, considered with reference to the conditions of its operation. In the course of the judgment several passages from the civil law and its commentators, which throw light upon the subject, were cited and observed upon as follows:

Rule of civil
law.

"With the rule of the civil law rightly understood, which, in the language of Ulpian, says, '*Res judicata pro veritate accipitur*,' the law of England generally agrees. The sound reason of the rule can scarcely be better expressed than it is by Paulus in the Digest, thus: '*Singulis controversiis singulas actiones, unamque judicati finem sufficere probabili ratione placuit; ne aliter modus litium multiplicatus summam atque inexplicabilem faciat difficultatem, maxime si diversa pronunciarentur*;' " Dig. lib. 44, tit. 2, s. 6. Other passages in the same division of the Digest are to this effect; thus Ulpian says: "*Et generaliter (ut Julianus definit) exceptio rei judicatæ obstat quoties inter easdem personas eadem quæstio revocatur, vel alio genere judicii*;" s. 7. Paulus says: "*Cum quæritur, hæc exceptio noceat necne?*"

inspiciendum est an idem corpus sit ; (s. 12). * * * Et an eadem causa petendi et eadem conditio personarum : quæ nisi omnia concurrunt, alia res est ;" s. 14. And again : " Si quis interdicto egerit de possessione postea in rem agens non repellitur per exceptionem ; quoniam in interdicto possessio, in actione proprietas vertitur ;" Ibid. And Neratius : " Cum de hoc, an eadem res est, quæritur, hæc spectanda sunt ; personæ ; id ipsum de quo agitur ; causa proxima actionis : nec jam interest, quâ ratione quis eam causam actionis competere sibi existimasset ; perinde ac si quis, postea quam contra eum judicatum esset, nova instrumenta causæ suæ reperisset ;" s. 27. Voet, in his commentary on this title, says : " Non aliter tamen huic exceptioni locus est, quam si lis terminata denuo moveatur inter easdem personas, de eâdem re, et ex eâdem petendi causâ ; sic ut, uno ex his tribus deficiente, cesset. Eadem res intelligitur quoties apud judicem posteriorem id quæritur quod apud priorem quæsitum est. Eadem petendi causa est etiam, licet non eâdem agatur actione, sed alio judicii genere eadem quæstio ventiletur ; cum eandem causam non tam actio faciat, quam potius origo petitionis. Quâ ratione, cum propter rei emptæ vitium tale, propter quod eam emptor empturus non fuisset, et 'redhibitoria et quanti minoris' actio competere possit, sic ut actio 'quanti minoris' etiam redhibitionem tunc contineat, Juliano placuit, eum qui alterutrâ earum egerit, si alterâ postea agat, rei judicatæ exceptione submovendum esse." Vinnius, in a note to the 13th title of the 4th Book of the Institutes, upon the words " per exceptionem rei judicatæ," says : " Quæ ita agenti obstat si eadem quæstio inter eosdem revocetur, id est, si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum ;" and other commentators express themselves to a similar effect. And see Quinct. Inst. Orat. lib. 5, c. 2.

Estoppels
quasi of
record.

The Vice-Chancellor proceeded, after a discussion of the leading English authorities, to state his apprehension of the law as derived from them and other authentic sources to be, that " generally the judgment neither of a concurrent nor of an exclusive jurisdiction is (whether receivable or not receivable) conclusive evidence of any matter which came collaterally in question before it, though within the jurisdiction, or of any matter incidentally cognizable, or of any matter to be inferred by argument from the judgment ; and that a judgment is final only for its proper purpose, and

Judgment not
final as to
collateral
matters.

Estoppels
quasi of
record.

object." See the judgment in *Hobbs v. Henning*, 17 C. B. N. S. 826, accord. See also *Re Allsop*, 61 L. T. 213.

And, in a subsequent part of his judgment (after putting numerous cases to illustrate the injustice and absurdity that would flow from holding decisions upon facts in proceedings *inter partes* to be conclusive upon the parties for all purposes), his honour proceeded to say: "Lord Ellenborough, certainly, and the Court of King's Bench, in *Outram v. Morewood*, decided most accurately, with reference to the pleadings in that action at common law, that an allegation on record, upon which issue has been once taken and found, is, between the parties taking it, conclusive according to the finding thereof, so as to estop them respectively from litigating that fact once so tried and found. The action, however, in *Outram v. Morewood*, raised, as to the same property, and for the same purpose, the same issue as was raised and tried in the action, the judgment wherein was pleaded; and there are material points of distinction between the system of pleading of the English courts of common law and those of other courts of justice. But it is, I think, to be collected, that the rule against re-agitating matter adjudicated is subject generally to this restriction: that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question; provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. This limitation to the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority. I am not now referring to the law applicable to certain prize and admiralty questions, which are governed by principles in some respects peculiar. On the whole I am not at present prepared to say that, according to the proper sense of the expression, the judgment of the Ecclesiastical Court between these parties was directly upon the point of the alleged illegitimacy of R. J. S., and had the establishment of that supposed fact for its proper purpose and object, so as to render his illegitimacy *rem judicatam* between the parties on a question of distribution."

In a later case before Lord Westbury, where the dismissal of a bill in equity by the Supreme Court at Sydney was set up, in a suit here by the same plaintiff, as an answer on the ground that the colonial suit had dealt with the same subject-matter, his lordship cited, as the best statement of the conditions necessary for the validity of the defence of *res judicata*, the passage from the commentary of Vinnius set out above in the judgment of Knight Bruce, V.-C., in *Barrs v. Jackson*, and held that, as the allegations and equity of the bill at Sydney were different from the allegations and equity of the bill in the English court, the decision of the colonial court was not conclusive against the plaintiff here, although the subject-matter of the suit was identical; *Hunter v. Stewart*, 31 L. J. Ch. 346.

Estoppels
quasi of
record.

Hunter v.
Stewart.

It will be at once perceived that the judgment in *Barrs v. Jackson*, from which extracts have been given, is not confined in its effects to decisions in the Ecclesiastical Courts, but that it deals with principles of general application. The practical results to which it points have the sanction of additional authority in the cases of decrees in Chancery: *Bainbrigge v. Baddeley*, 2 Phil. 705; *Toulmin v. Copeland*, Id. 711; of foreign judgments: *Behrens v. Sieveking*, 2 M. & C. 602; of deeds: *Carpenter v. Buller*, 8 M. & W. 209; of proceedings in the Admiralty Court against the ship in cases of collision: *Nelson v. Couch*, 15 C. B. N. S. 99; and will be found to take place, more or less, in every part of the law of estoppel.

Above rules
not confined to
Ecclesiastical
Courts.

The principle on which the common law doctrine of estoppel rests is applicable to matrimonial suits in the Court for Divorce and Matrimonial Causes (whose jurisdiction, however, the Judicature Act, 1873, s. 16, has transferred to the High Court of Justice): and consequently the judgment of that court upon a matter *directly in issue* has ordinarily been deemed to be conclusive on the same matter, between the same parties, in another suit; although this rule has not been applied in cases in which the same issue was triable in the two suits upon different principles with reference to the admissibility of evidence. See *Sopwith v. Sopwith*, 30 L. J. Matr. 131, where, in a suit by a husband for restitution of conjugal rights, the wife pleaded in bar the husband's adultery, and this plea was held by Cresswell, J., to be bad, the replication showing that in a previous suit by the wife for a judicial separation the same acts of adultery had been pleaded by her, had been denied by the husband,

Estoppel in
Divorce Court.

Sopwith v.
Sopwith.

Estoppels
quasi of
record.

and had been found by the court not to be proved. Some *dicta* in the Ecclesiastical Courts which seemed to show that the same strictness of proof was not necessary in those courts in order to establish matters pleaded by way of defence, as was required where the same matters were alleged in a petition, were examined and explained by Cresswell, J., in his judgment in this case.

Finney v.
Finney.

Where a wife's petition for separation on the ground of cruelty was dismissed, she was held estopped from setting up the same charges, coupled with others of adultery, in a petition for dissolution of marriage; *Finney v. Finney*, L. R. 1 P. & D. 483. And a decree of the court, refusing a husband's petition for a divorce on the ground of his adultery, was held admissible *as evidence* against him in a subsequent suit by him, though against another co-respondent; *Conradi v. Conradi*, Id. 514. In *Butler v. Butler*, (1893) P. 185, (1894) P. 25, there had been cross suits between husband and wife, and a decree *nisi* was granted against the husband on the ground of his adultery and cruelty, but was afterwards rescinded upon the ground of collusion. In a subsequent suit by the husband for a divorce, it was held that the decree *nisi* in the former suit was *conclusive* evidence of the adultery of the husband.

Conradi v.
Conradi.

Butler v.
Butler.

Decision of
Courts of
Admiralty,
when *in rem*.

With regard to *Courts of Admiralty*, the rule with regard to their sentences is the same as that regarding the sentences of spiritual courts where their proceeding is *in rem*. For instance, when a vessel is condemned *as prize*, it seems never to have been disputed that the sentence is conclusive upon all the world. See the notes to *Le Caux v. Eden*, 2 Dougl. 613, in which is set out the elaborate judgment in *Lindo v. Rodney*, containing a learned inquiry into the nature of the *Prize Court of Admiralty*, and the distinction between it and the *Instance Court*. The 24 & 25 Vict. c. 10, and 27 & 28 Vict. cc. 24, and 25, extended and defined the jurisdiction of the Court of Admiralty, which, as before stated, the Judicature Act, 1873, s. 16, transferred to the High Court of Justice. The question as to the conclusiveness of the sentence of a prize court has usually arisen in cases turning upon the effect of foreign sentences, several of which will be presently enumerated. (See *post*, pp. 779 *et seq.*)

Sentence of
college visitor.

The sentence of a college visitor depriving or expelling is conclusive; and, it is apprehended, is so against all the world, since the visitor's proceeding is *in rem*, and he

pronounces operatively upon the *status* of the party deprived: see *Philips v. Bury*, Skinn. 447, 1 Ld. Raym. 5, which was decided by three judges, contrary to the opinion of Lord Holt, which opinion was, however, afterwards upheld in error. His lordship's argument is fully given in 2 T. R. 346, where he assimilates the case to that of a sentence of deprivation by the ecclesiastical courts, and cites numerous authorities to show that that has always been conclusive. In *Philips v. Bury*, the sentence of deprivation passed upon the old rector was held conclusive in an ejection by the new rector. In *R. v. Grundon*, 1 Cowp. 315, the same point was decided upon an indictment for assaulting a fellow-commoner of Queen's (who had been expelled), and turning him out of the college garden.

Estoppels
quasi of
record.

On the same principle the *sentence of a Court martial* seems to be conclusive; see *R. v. Suddis*, 1 East, 306; for this court, to use the words of Lord Loughborough, in *Grant v. Gould*, 2 H. Bl. 100, "being established in this country by positive law, the proceedings of it . . . must depend upon the same rules with all other courts which are instituted, and have particular powers given them." See *Re Poe*, 5 B. & Ad. 681, 688; *Hannaford v. Hunn*, 2 C. & P. 148, where the party relying on the sentence neglected to place it on the record, and it was held on that account not to be an estoppel.

Of court
martial.

The decision of a judge under the Parliamentary Elections Act, 1868, has been held binding on all parties as a judgment *in rem*; *Waygood v. James*, L. R. 4 C. P. 361. *Secus* as to his report, *Stevens v. Tillett*, 6 Id. 147, at any rate where fresh information is obtained.

Election
petition.

In *Kemp v. Neville*, 10 C. B. N. S. 523, which was an action of false imprisonment against the Vice-Chancellor of the University of Cambridge, the defendant justified under the charters of the university confirmed by statute, which gave power to make inquisition, and punish by imprisonment, and the court in giving judgment for him said, "The rule that a judicial officer cannot be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction, *and also the rule* that a matter of fact so adjudicated by him cannot be put in issue in an action against him, have been uniformly maintained."

Sentence of
Vice-Chan-
cellor of
Cambridge.

Sentence of deprivation by a visitor appears to differ from the other cases above touched upon in this respect, viz., that it is the sentence of a tribunal which has in many

No distinction
though
tribunal
created by

Estoppels
quasi of
record.

private
individual.

Dismissal of
schoolmaster
by trustees.

Arbitrator.

Effect of
verdict, &c.,
in compensa-
tion cases.

instances been created by a private individual. This does not, however, seem to alter the principle; for, though no private individual can create a court whose sentence shall have operation on the persons or properties of others, yet there is no reason why he should not create one having operation on his own; unless, indeed, he introduce some term inconsistent with public policy.

Thus, on the same ground on which a visitor's sentence is supported, stands the case of the trustees of a school dismissing the schoolmaster for misconduct; *Doe v. Haddon*, 3 Dougl. 310; see *R. v. Darlington School*, 6 Q. B. 682; and the ordinary case of an arbitrator, whose *forum* is a domestic one, constituted by the parties themselves who are bound by its award; see *Gueret v. Audouy*, 62 L. J. Q. B. 633. But, although this is the general rule where the precise question determined by the arbitrator is raised again between the same parties, the finding by an arbitrator that a patent is not void on a question of infringement referred to him, has been held not to estop the same defendant, in a second action by the same plaintiff for another infringement, from disputing the validity of the patent; *Newall v. Elliot*, 1 H. & C. 797.

As to the effect of verdicts and judgments upon inquiry under the compensation clauses of the Lands Clauses Consolidation Act, 1845, reference should be made to *Read v. Victoria Station Co.*, 1 H. & C. 826, where the authorities are collected, and it was held that a verdict and judgment under these clauses did not estop the company from alleging, in an action on the judgment, that the lands were not injuriously affected by their works. But the modern decisions show that in cases of compensation under these statutes the legislature has delegated to the compensation jury exclusive jurisdiction over the *amount* of compensation, but not over the question as to the party's *right* to demand compensation; see *R. v. L. & N. W. R. Co.*, 3 E. & B. 443; *Chapman v. Monmouthshire R. Co.*, 2 H. & N. 267; *Re Newbold v. Metropolitan R. Co.*, 14 C. B. N. S. 405; and *Barber v. Nottingham Canal Co.*, 15 Id. 726, where the same principle was applied to a verdict by a compensation jury under some canal Acts, which verdict was followed by a judgment for the amount by the canal commissioners, and which verdict and judgment were to be by the terms of the Acts "binding and conclusive to all intents and purposes."

The file of proceedings in a bankruptcy is not a record so as to create an estoppel; *Ex p. Bacon*, 17 Ch. D. 447.

File of proceedings in bankruptcy.
Pleading.

It has never, that I am aware of, been decided, unless indeed *Hannaford v. Hunn* be a decision to that effect, that, where a decree in Chancery, a sentence of the Ecclesiastical Court, or any other matter *quasi of record*, is conclusive, any necessity existed (before the Judicature Acts) of pleading it in order that it might be held so. This furnishes another argument against the reasoning on which *Goddard's Case* and *Vooght v. Winch* are thought by some to have proceeded (see *ante*, pp. 747 *et seq.*), for surely the obligation of the jury to find a true verdict is equally great, whether the matter offered as conclusive be a decree or a judgment. As to the rules which regulated pleadings before the Judicature Acts, see *General St. Nav. Co. v. Guillou*, 11 M. & W. 877.

Foreign Judgments.

The above observations have been mainly confined to the judgments of our own tribunals; but, before quitting this part of the subject, it seems right to say a few words upon the effect of *foreign* ones.

Effect of foreign judgments.

With regard to *foreign judgments* (and colonial judgments are included within this term), there has been considerable discussion on the question to what precise extent they bind in this country. "Great doubts have formerly existed, and some degree of doubt still exists, whether a judgment so recovered is conclusive between the parties, or whether the matter may be opened and agitated in this country;" *per Tindal, C.J., Smith v. Nicolls*, 5 B. N. C. 208, 221.

They certainly do not occasion a merger of the original ground of action; *Smith v. Nicolls, supra*; *Hall v. Odber*, 11 East, 118, 124; *Bank of Australasia v. Harding*, 9 C. B. 661; *Bank of Australasia v. Nias*, 16 Q. B. 717; *Kelsall v. Marshall*, 1 C. B. N. S. 241; and when it becomes necessary to enforce them in this country the plaintiff has his option either to resort to the original ground of action or to sue upon the judgment; *per Tindal, C.J., Smith v. Nicolls, supra*.

No merger of original ground of action.

It may possibly be, that if the plaintiff should adopt the former part of this alternative, and sue on the original ground of action, it would be open to the defendant to controvert that ground of action notwithstanding the production of the foreign judgment, on the same principle on which it

When original ground of action sued upon, judgment may perhaps be controverted.

Effect of
foreign
judgments.

But is *prima
facie* evidence.

How far
foreign judg-
ments, when
sued upon,
contro-
vertible.

Principle on
which they are
enforced in
English
courts.

is held that where there is an opportunity of placing the judgment of one of our own superior courts on the record, and it is not placed there, it will not be conclusive; see *Vooght v. Winch*, 2 B. & Ald. 662; *Doe v. Huddart*, 2 C. M. & R. 316; and *ante*, p. 750. That it operates, however, in such a case as at least *prima facie* evidence of the plaintiff's right seems clear both upon principle and authority; see *per* Eyre, C.J., *Phillips v. Hunter*, 2 H. Bl. 402, 410; *Sinclair v. Fraser*, 1 Dougl. 5; and *Hall v. Odber*, *supra*.

But next, which is by far the most common case, let us suppose the action to be brought upon the foreign judgment—the question arises, would it be competent to the defendant, admitting its existence, to controvert it to any, and, if to any, to what extent?

An important element in the consideration of this question is the principle on which our courts give effect to foreign judgments. This was stated in *Schibsby v. Westenholtz*, L. R. 6 Q. B. 155, 159, to be, not as is sometimes loosely said, international comity, but “that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce;” “and consequently, that anything which negatives that duty or forms a legal excuse for not performing it, is a defence to the action” on the foreign judgment; see also *Godard v. Gray*, Id. 139, 148. In *Rousillon v. Rousillon*, 14 Ch. D. 351, 370, Fry, J., cited the above passage from the judgment in *Schibsby v. Westenholtz*, apparently with approval.

In *Abouloff v. Oppenheimer*, 10 Q. B. D. 295, the C. A. expressly declined to lay down a rule on the subject. In *Grant v. Easton*, 13 Id. 302, where the C. A. held that in an action on a foreign judgment the writ may be specially indorsed under Order III. Rule 6, Brett, M.R., said: “An action upon a foreign judgment may be treated as an action in either debt or assumpsit: the liability of the defendant arises upon the implied contract to pay the amount of the foreign judgment.” See also *Hawksford v. Giffard*, 12 App. Cas. 122, 126, where the J. C. said that in a Jersey Court an English judgment is “no more than evidence of a debt.”

Pleading.

The question formerly arose upon a plea of *non assumpsit*, upon the trial of which, the judgment, being offered in evidence, was asserted by one side and denied by the other

to be conclusive. But there is, it is apprehended, no doubt that in such an action it is, at any rate since the Judicature Acts, necessary to plead the circumstances impeaching the judgment specially.

Effect of
foreign
judgments.

Upon the question of conclusiveness there are some points which are more or less clear.

First, as to cases where the defect is *apparent on the face of the foreign proceedings*.

In *Godard v. Gray*, L. R. 6 Q. B. 139, Blackburn, J., and Mellor, J., held, on the authority of *Castrique v. Imrie*, L. R. 4 H. L. 414, that a mere mistake as to English law does not vitiate a foreign judgment, though only *in personam*, and though the mistake be apparent on the face of the proceedings. Hannen, J., while concurring in the judgment on other grounds, declined to accept this view. Lush, J., however, apparently accepted it in *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 159. The decision in *Castrique v. Imrie*, which will be noticed more fully below (*post*, p. 789), was upon a judgment *in rem*, as to which it will be seen that different considerations perhaps apply.

Mistake as to
English law
does not
vitate judg-
ment.

In the original edition of these notes, *Novelli v. Rossi*, 2 B. & Ad. 757, was cited as deciding the contrary, but in the opinion of the judges delivered by Blackburn, J., in *Castrique v. Imrie*, it was stated that *Novelli v. Rossi* proceeded on the want of jurisdiction, and to this view his lordship adhered in *Godard v. Gray*. In *Simpson v. Fogo*, 32 L. J. Ch. 249, however, Wood, V.-C., treated *Novelli v. Rossi* as decided upon the mistake of English law.

Mistake
appearing on
the face of
foreign pro-
ceedings.

In *Godard v. Gray*, Blackburn, J., thus dealt with the question of a mistake apparent on the face of the proceedings: "It can make no difference that the mistake appears on the face of the proceedings. That, no doubt, greatly facilitates the proof of the mistake: but, if the principle be to inquire whether the defendant is relieved from a *prima facie* duty to obey the judgment, he must be equally relieved whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence. Nor can there be any difference between a mistake made by the foreign tribunal as to English law and any other mistake.... If indeed foreign judgments were enforced by our courts out of politeness and courtesy to the tribunals of other countries, one could understand its being said that though our courts would not be so rude as to enquire whether the foreign court had made a mistake, or to allow the defendant to assert

Godard v.
Gray.

Principles on
which foreign
judgments
enforced.

Effect of
foreign
judgments.

that it had, yet that if the foreign court itself admitted its blunder they would not then act; but it is quite contrary to every analogy to suppose that an English court of law exercises any discretion of this sort. We enforce a legal obligation, and we admit any defence which shows that there is no legal obligation or a legal excuse for not fulfilling it; but in no case that we know of is it ever said that a defence shall be admitted if it is easily proved, and rejected if it would give the court much trouble to investigate it. Yet on what other principle can we admit as a defence that there is a mistake of English law apparent on the face of the proceedings, and reject a defence that there is a mistake of Spanish or even Scotch law apparent in the proceedings, or that there was a mistake of English law not apparent on the proceedings, but which the defendant avers that he can show did exist?" L. R. 6 Q. B. 151, 152.

In that case, as the *fact* of the mistake was held to have no effect in vitiating the foreign judgment, the question would certainly seem to have been immaterial whether that fact appeared on the face of the proceedings, or whether it would have been necessary to prove it by extrinsic evidence.

If the true principle upon which our courts enforce foreign judgments is that stated above, and not that our courts by international comity extend the doctrine of estoppel by record to the proceedings of foreign tribunals, then it certainly would seem that, as far as any objection founded on estoppel is concerned, it can make no difference in any case whether the objection raised to a foreign judgment appear on the face of the proceedings or not. But the above proposition is a wide one, which, with the greatest deference to the learned judges who formed the majority of the court in *Godard v. Gray*, may yet in view of the earlier decisions be perhaps open to discussion. See the cases as to decisions *in rem* by foreign prize courts, cited and discussed, *post*, pp. 779 *et seq.*; *Bolton v. Gladstone*, 2 Taunt. 85, a case similar to them; and *Obicini v. Bligh*, 8 Bing. 335. See also the judgments in *Imrie v. Castrique*, 8 C. B. N. S. 405, L. R. 4 H. L. 414; *Simpson v. Fogo*, 29 L. J. Ch. 657, 32 Id. 249; and *Liverpool Marine Co. v. Hunter*, 4 Eq. 62. In *Abouloff v. Oppenheimer*, 10 Q. B. D. 295, the C. A. treated the question as an open one. But see, in accordance with the principle stated above by Blackburn, J., the judgments in *Hobbs v. Henning*, *post*, p. 784. In *Meyer v. Ralli*, 1 C. P. D. 358, where it appeared on the express findings of a

special case that the prize tribunal had made an order erroneous according to the law it was administering, the court declined to enforce it.

Effect of
foreign
judgments.

In the first and subsequent editions of these notes it was stated to be clear that a foreign judgment would not be conclusive, either in a declaration or a plea, if it should appear *on the face of the proceedings* to be founded on a mistaken notion of the law of nations; *Pollard v. Bell*, 8 T. R. 434, 444; *Bird v. Appleton*, Id. 562; *Baring v. Clagett*, 3 B. & P. 201, 215; *Bolton v. Gladstone*, 2 Taunt. 85; or to offend common reason and justice; *Buchanan v. Rucker*, 1 Camp. 63, 9 East, 192 (see *Cavan v. Stewart*, 1 Stark. 525; *Frankland v. M'Gusty*, 1 Knapp, 274; *Bruce v. Wait*, 1 M. & Gr. 1, where the judgment was that of an inferior English court; S. P., *Ward v. Ellayn*, Cro. Jac. 261); or even to be grossly defective; *Obicini v. Bligh*, 8 Bing. 335.

Instances of
foreign judg-
ments not
conclusive.

But it is apprehended that all these cases may be referred either to the fact that the foreign judgment did not decide the very point at issue, or to the principle (*viz.*, want of jurisdiction) upon which *Novelli v. Rossi* was explained in the opinion of the judges delivered by Blackburn, J., in *Castrique v. Imrie* (see *ante*, p. 767). In *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 160, Blackburn, J., treated Lord Ellenborough's expressions as to "natural justice" in *Buchanan v. Rucker*, 1 Camp. 63, 65, as mere "declamation" at *nisi prius*, and stated that he afterwards abandoned them *in banco*. See, however, as to the violation of natural justice, or the enforcement of barbarous laws, *Cammell v. Sewell*, 5 H. & N. 728, and *Liverpool Marine Co. v. Hunter*, 4 Eq. 62.

Different
explanation of
these cases.

Blackburn, J., very fully discussed the origin and effect of the rules as to the enforcement of a foreign judgment by our courts, and the effect of his discussion may be stated to be, that want of jurisdiction by the foreign court may be shown by extrinsic evidence, and that if there was no jurisdiction, no obligation arises which our courts will enforce; but, if there was jurisdiction, the judgment creates an obligation, which our courts will enforce and which is not affected by matters such as those above suggested, whether apparent on the face of the proceedings or not.

Per Black-
burn, J.

There is considerable authority for saying that where a judgment of a foreign court is given in perverse and wilful disregard of the law of England when clearly and plainly put before it, though the law governing the case be that of

Effect of per-
verse and
wilful disre-
gard of
English law
by foreign
courts.

Effect of
foreign
judgments.

England, it would not be enforced by the tribunals of this country, though the defect be *not apparent on the face of the proceedings*. See *Imrie v. Castrique*, 8 C. B. N. S. 415, *per* Cockburn, C.J. : L. R. 4 H. L. 414, *per* Lord Hatherley ; *Simpson v. Fogo*, 29 L. J. Ch. 657, 32 Id. 249 ; *Liverpool Marine Co. v. Hunter*, 4 Eq. 62 : 3 Ch. 479, *per* Lord Chelmsford. In *Godard v. Gray*, L. R. 6 Q. B. 139, 151, Blackburn, J., carefully abstained from inquiry into the question whether a foreign judgment would be enforceable, if “founded on an incorrect view of the English law knowingly or perversely acted upon.”

Want of
jurisdiction.
Extrinsic
evidence.

It is also not too much to say that our courts would allow a foreign judgment, whether *in personam* or *in rem*, to be impeached by extrinsic evidence, showing distinctly that the court which pronounced it had no jurisdiction ; *Havelock v. Rockwood*, 8 T. R. 268 ; *Bowles v. Orr*, 1 Y & C. 464 ; *Schibsby v. Westenholz*, L. R. 6 Q. B. 155.

Judgment
obtained by
fraud ;

It is well established now that it may be impeached by extrinsic evidence that it was obtained by fraud, for as De Grey, C.J., said in *Duchess of Kingston's Case*, *ante* p. 720, “fraud is an extrinsic collateral act, which vitiates the most solemn proceedings,” even of our own courts ; see *Ochsenbein v. Papelier*, 8 Ch. 695 ; *Girdlestone v. Brighton Aquarium Co.*, 4 Ex. D. 107 ; *Abouloff v. Oppenheimer*, 10 Q. B. D. 295 ; *Vadala v. Lawes*, 25 Id. 310 ; and *ante*, p. 756. The two last cases show clearly that the defendant in an action on a foreign judgment may show that the judgment was obtained by fraud, and, if it be necessary for that purpose, have questions re-tried which were adjudicated upon by the foreign court. The fraud must be that of the party who obtained the judgment.

or without
notice to
defendant.

The judgment may also be impeached by showing that it was obtained by means contrary to the established principles of justice, as, for instance, without summoning or obtaining the appearance of the defendant or any equivalent proceeding ; for such an objection, if apparent on the proceedings, would be fatal, either on this ground, or on that of want of jurisdiction ; and it would probably be thought too great a confidence to repose in the officers of a foreign court, if we were to assume the impossibility of their stating the observance of such forms in cases where they were not actually observed.

Reason for
not enforcing
judgment

Indeed, in this country, a party may, as we know, obtain a judgment against another behind his back, if he will abuse

the forms of the superior court, and deceive its officers. To be sure, if he were to attempt to enforce such a judgment, the defendant would have a speedy remedy by applying to have it set aside. Where it is the judgment of a foreign court, however, he *may* have no such means of redress, and is almost certain to have no opportunity given him to adopt them; see *Guinness v. Carroll*, 1 B. & Ad. 459 (where the question was discussed whether it could be shown, in answer to an Irish judgment, that it was entered up by the wrong person); *Ferguson v. Mahon*, 11 A. & E. 179; *Don v. Lippman*, 5 Cl. & F. 1; and *Price v. Dewhurst*, 8 Sim. 279, 302.

Effect of
foreign
judgments.
obtained with-
out notice.

In *Ferguson v. Mahon*, in debt upon an Irish judgment, a plea that the defendant was not at any time arrested or served with any process issuing out of the Irish Court, at the suit of the plaintiff for the cause of action for which the judgment was obtained, nor had at any time notice of any such process, nor did at any time appear in such court to answer the plaintiff in the action on which the judgment was obtained, was held good on demurrer. But in *Reynolds v. Fenton*, 3 C. B. 187, to a declaration, founded on a judgment of the Tribunal of Commerce at Brussels, a similar plea was held bad on general demurrer for not showing that the defendant never had notice of the proceedings in such a way that he might defend the action. The distinction between that case and *Ferguson v. Mahon*, was said to be that the court, in *Ferguson v. Mahon*, could take judicial notice that the law of Ireland is the same as the law of this country with regard to the commencement of a suit by process, but that the court in *Reynolds v. Fenton*, could not judicially know that a suit could not be commenced in Belgium without process. Whether that distinction be a sound one may be doubted, when it is remembered that it required a section of the Act of Union to make the Irish statute-book *evidence* in this country (which was needless, if the courts in England could take judicial notice of the law of Ireland), and further, that even in England there may be a valid judgment without process or appearance, as in the case of a warrant of attorney to confess judgment.

Ferguson v.
Mahon.

Reynolds v.
Fenton

In *Cowan v. Braidwood*, 1 M. & Gr. 882, a plea to a declaration in *assumpsit*, on a Scotch judgment, that the defendant was not, at the commencement of or during the action, in Scotland, or within the jurisdiction of the court, nor was notified, nor knew of any of the proceedings, was

Decisions as
to proceedings
under special
laws dis-
pensing with
notice.

Effect of
foreign
judgments.

held insufficient. But the decision in that case seems to have turned to some extent upon a statute relating to proceedings in Scotland, 6 G. 4, c. 120, s. 53. See further, concerning judgments under special laws as to proceeding without actual notice; *Meeus v. Thellusson*, 8 Exch. 638; *Vallee v. Dumergue*, 4 Id. 290; *Sheehy v. Professional Life Ass. Co.*, 13 C. B. 787, 2 C. B. N. S. 211, 3 Id. 597; *Copin v. Adamson*, L. R. 9 Ex. 345, 1 Ex. D. 17; *Meyer v. Ralli*, 1 C. P. D. 358.

Statement on
face of pro-
ceedings
primâ facie
evidence that
formalities
observed.

It appears from *Molony v. Gibbons*, 2 Camp. 502, that the statement upon the face of the proceedings, that the proper formalities have been observed, is at least *primâ facie* evidence that they were so. There the plaintiff sued on a Jamaica judgment. In the judgment, after the declaration, there was the following entry: "And the said J. Gibbons, by J. Ferrier, his attorney, comes and defends, &c., and says nothing in bar or preclusion of the said action," &c. It was objected that the plaintiff ought to prove that Ferrier was properly constituted the defendant's attorney. Lord Ellenborough, however, said: "I will look to these foreign judgments with great jealousy; but I must give them credit for the facts which they specifically allege, and I must presume in the present case that the court saw Ferrier properly constituted attorney for the defendant." The rule as to presuming the regularity of the proceedings in a foreign court, was somewhat more liberally laid down in *Cowan v. Braidwood*, and *Reynolds v. Fenton*, cited above, and in *Russell v. Smyth*, 9 M. & W. 810.

Question who
is bound by
foreign judg-
ment not
treated here.

It is not intended to enter here into any elaborate review of the cases in which the question has been, whether the defendant was so far in the nature of a resident within the colony or jurisdiction of the foreign court as would satisfy the principle stated in *Buchanan v. Rucker*, and *Becquet v. MacCarthy*, 2 B. & Ad. 951; *Vallee v. Dumergue*, 4 Exch. 290; *Meeus v. Thellusson*, 8 Id. 638; *Sheehy v. Professional Life Ass. Co.*, *supra*; nor of the cases in which has been considered the question whether the judgment was so far final and absolute as to constitute a sufficient new cause of action or suit in itself; see *Patrick v. Shedden*, 2 E. & B. 14; and *Paul v. Roy*, 15 Beav. 433; and *post*, p. 778;—the main object of this note being to enquire, not into the essentials of a valid judgment, but into the question, how far the judgment stating those essentials, be they what they may, is evidence of their existence. For an elaborate discussion

Nor whether
judgment final
so as to be
new cause of
action.

of the former question the reader is referred to *Schibsby v. Westenholz*, L. R. 6 Q. B. 155; *Copin v. Adamson*, L. R. 9 Ex. 345, 1 Ex. D. 17; and *Rousillon v. Rousillon*, 14 Ch. D. 351.

Effect of
foreign
judgments.

In *Schibsby v. Westenholz*, the Q. B. held that a judgment of a French court, obtained in default of appearance, though with notice of the proceedings, against defendants domiciled in England, and in no sense French subjects, and having no property in France, was not enforceable in an English court, on the ground that there existed nothing in the case imposing on the defendants any duty to obey the judgment of a French tribunal. In *Copin v. Adamson*, it was considered that the circumstances were such as to impose the duty, inasmuch as the defendant, by being a shareholder in a French company, which provided for the case by its articles of association, had submitted to the foreign jurisdiction, and the judgment could therefore be enforced here. In *Rousillon v. Rousillon*, Fry, J., said: "What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign court? Having regard to *Schibsby v. Westenholz* and *Copin v. Adamson*, they may, I think, be stated thus: The courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained; and possibly, if *Becquet v. MacCarthy*, 2 B. & Ad. 951, be right, where the defendant has real estate within the foreign jurisdiction in respect of which the cause of action arose whilst he was within that jurisdiction."

Schibsby v.
Westenholz.

Copin v.
Adamson.

Rousillon v.
Rousillon.

It seems clear that the judgment of a foreign court does not bind persons sued therein as *defendants*, and not shown to have been subjects of or resident or present in the country when the suit began, so as to be bound by reason of allegiance, or domicile, or temporary presence; *General St. Nav. Co. v. Guillou*, 11 M. & W. 877, 894; *Schibsby v. Westenholz*, L. R. 6 Q. B. 155; or to have voluntarily submitted, by agreement or appearance or otherwise, to the jurisdiction; *Copin v. Adamson*, *supra*; *De Cosse Brissac v. Rathbone*, 6 H & N. 301; see *Meyer v. Ralli*, 1 C. P. D. 358; *Turnbull v. Walker*, 67 L. T. 767.

Foreign judg-
ment does not
bind defen-
dant where no
allegiance.
Or consent to
jurisdiction.

Effect of
foreign
judgments.

*Sirdar
Gurdial
Singh v.
Faridkote.*

This question was fully discussed in the Privy Council, in *Sirdar Gurdial Singh v. Faridkote*, (1894) A. C. 670, 683, where the law is thus laid down by Lord Selborne: "There was nothing to take this case out of the general rule, that the plaintiff must sue in the court to which the defendant is subject at the time of the suit. . . . All jurisdiction is properly territorial, and 'extra territorium jus dicenti, impune non paretur.' Territorial jurisdiction (with special exceptions) attaches upon all persons either permanently or temporarily resident within the territory, while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty, the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction, which any foreign court ought to recognise, against foreigners, who owe no *allegiance or obedience* to the power which so legislates."

Where the foreign tribunal has caused the defendant's goods to be seized to enforce appearance, the English courts have not yet decided whether an appearance under such duress is voluntary within the above exception. But the mere fact that the defendant has property in the foreign country, and that he appears to save it from possible seizure, does not prevent the appearance from being voluntary; *Voinet v. Barrett*, 55 L. J. Q. B. 39. For the American law upon this subject, see Story, Conflict of Laws, c. 15.

Can a foreign
judgment be
impeached on
the merits?

Assuming, then, that a foreign judgment is impeachable in some cases for a defect apparent on the face of it—assuming, also, that it is impeachable by extrinsic evidence, adduced to show that the court which pronounced it had no jurisdiction, or that it was obtained by fraud, or by a neglect of those precautions which the universal principles of justice render necessary—the question which arises next is, *whether it can be impeached upon the merits?*—a question which has given rise to no little controversy.

Upon one side it is said, that the tribunals of this country are not *bound* to enforce the judgments of a foreign court, that when they do so, it is *de gratiâ*, and from a wish to

extend the limits of justice—*ampliare justitiam*; but that it would be to amplify injustice, not justice, were they to enforce a sentence, which ought never to have been pronounced, because against the party with whom right was. On the other side, it is answered with great force, that invariable experience shows that facts can never be inquired into so well as on the spot where they arose, laws never administered so satisfactorily as in the tribunals of the country governed by them; that, if our courts were to allow matters judicially decided upon to be again opened at any distance of time or place, the consequence would be, in ninety-nine cases out of a hundred, that they would be deceived by the concoction of testimony, or by the abstraction of it, or by the want of it, and that injustice and mistakes, instead of being amended, would be generated.

Effect of
foreign
judgments.

Now, on both sides of this question there is a good deal of authority. On the former side, is the opinion of Lord Mansfield in *Walker v. Witter*, 1 Dougl. 1; of Eyre, C.B., in *Phillips v. Hunter*, 2 H. Bl. 410; and of Buller, J., in *Galbraith v. Neville*, 1 Dougl. 5, n., who cited the resolution of the H. L. in *Sinclair v. Fraser*, 20 How. Sta. Tr. 468, that “the judgment of the supreme court of Jamaica ought to be received as evidence *primâ facie* of the debt, and that it lies upon the defendant to impeach the justice thereof, or to show the same to have been irregularly or unduly obtained.” It will, however, be observed that in none of the above cases was it necessary to decide the question of conclusiveness. In *Sinclair v. Fraser*, the ground of appeal to the Lords was, not that the Scotch court had held the Jamaica judgment conclusive, but that it had refused to receive it even as *primâ facie* evidence of the existence of the debt. *Arnott v. Redfern*, 3 Bing. 353, sometimes cited as an authority on this side of the question, is, in reality, none, for there the only decision was, as in *Sinclair v. Fraser*, on the authority of which it proceeded, that the Scotch judgment was at all events *primâ facie* evidence. On the contrary, Best, C.J., expressly said: “We think that it is not necessary to consider whether the judgment pronounced by the Scotch court can be impeached here.” The observations of Lord Brougham in *Houlditch v. Donegal*, 8 Bli. N. S. 301, are adverse to the conclusiveness of foreign judgments.

Authorities
that it may be
so impeached.

On the other side is the opinion of Lord Hardwicke in *Boucher v. Lawson*, Ca. temp. Hardw. 89; of Lord Kenyon in

Authorities
contra.

Effect of
foreign
judgments.

Galbraith v. Neville, 1 Dougl. 6, n.; and Lord Ellenborough in *Tarleton v. Tarleton*, 4 M. & S. 21. In that case, the plaintiff, the defendant, and D. B. had been partners, and the defendant and D. B. had covenanted to indemnify the plaintiff against the debts of the late firm. In an action on that covenant, in order to prove the damage, a copy was put in of a foreign judgment, in consequence of which the plaintiff's property had been seized. Evidence was offered to impeach the correctness of this judgment. That being disallowed, the defendant moved for a new trial. The rule was refused. Lord Ellenborough said: "I thought I did not sit at *nisi prius* to try a writ of error in this case upon the proceedings in the court abroad. The defendant had notice of the proceedings, and should have appeared and made his defence." It must, however, be observed that Bayley, J., took a distinction which would suffice to prevent this case from bearing greatly on the question now under discussion. His lordship said, "*As between the parties to the suit, the justice of it might again be litigated; but, as against a stranger, it can not.*" This distinction is adopted by Lord Brougham in *Houlditch v. Donegal*.

In *Becquet v. MacCarthy*, 2 B. & Ad. 951, evidence was received at *nisi prius* to contradict the facts on which the colonial judgment proceeded. It was observed, during the subsequent argument, that it was not clear that that evidence was admissible; and Parke, J., said that Shadwell, V.-C., had held, in *Martin v. Nicolls*, 3 Sim. 458, "that the grounds of a foreign judgment cannot be reviewed in the courts of this country; and that a bill for a discovery and a commission to examine witnesses in *Antigua* in aid of the plaintiff's defence to an action brought on the judgment in this country was demurrable." *Martin v. Nicolls* was for some time the authority most directly bearing on the question; but see Lord Brougham's remarks on it, in *Houlditch v. Donegal*. There is an older case, of *Burrows v. Jemino*, 2 Str. 733, where an acceptor, whose acceptance had been vacated by a decree at *Leghorn*, being afterwards sued here, obtained an injunction, which would, however, I presume, hardly be granted in such a case at this day. In *Smith v. Nicolls*, 5 B. N. C. 221, Tindal, C.J., in the passage above cited (*ante*, p. 765), treated the point as still undecided. "Great doubts," his lordship said, "have formerly existed, and some degree of doubt still exists, whether a judgment so recovered is conclusive between the parties,

or whether the matter may be opened and agitated in this country." In *Ferguson v. Mahon*, 11 A. & E. 179, which was the case of an Irish judgment, Lord Denman said, "the inquiry is still open, *not indeed into the merits of the action or the propriety of the decision*, but whether the judgment passed under such circumstances as to show that the court had properly jurisdiction over the party." *Ricardo v. Garcias*, 12 Cl. & F. 368, is an additional authority for holding the decision of a foreign court having jurisdiction over the parties and subject-matter of the suit to be conclusive as to the merits. That view of the law was also adopted by the Common Pleas in *Bank of Australasia v. Harding*, 9 C. B. 661, and by the Queen's Bench in *Bank of Australasia v. Nias*, 16 Q. B. 717; which cases seem to have been decided in accordance with the better and prevailing opinion. See also *Kelsall v. Marshall*, 1 C. B. N. S. 241, and *Barber v. Lamb*, 8 Id. 95.

Effect of
foreign
judgments.

The question of judgments *in rem* will be dealt with more fully below, but it may now be said to be settled that when an action is brought on the judgment, though only *in personam*, or *inter partes*, of a foreign or colonial court having jurisdiction over the parties and the subject-matter of the suit, it cannot be impeached on the ground that it is erroneous on the merits; or that the foreign court has mistaken the law of its own or this country; see the cases above cited; *De Cosse Brissac v. Rathbone*, 6 H. & N. 301; *Scott v. Pilkington*, *Munroe v. Pilkington*, 2 B. & S. 11; *Godard v. Gray*, L. R. 6 Q. B. 139; and *Vadala v. Lawes*, 25 Q. B. D. 310, 316. But see *Meyer v. Ralli*, 1 C. P. D. 358, *ante*, p. 768, *ad finem*. Nor can what would have constituted a defence in the foreign court be pleaded in an action on the judgment here; *Vauquelin v. Bouard*, 15 C. B. N. S. 341; *Ellis v. M'Henry*, L. R. 6 C. P. 228; *per Hannen, J., Godard v. Gray, supra*. As to the case of fraud, see *ante*, p. 770.

Foreign judgment not
impeachable
on merits,

or for mistake
of foreign or
English law.

Defence
pleadable in
foreign action
unavailable
here,

The doubt which formerly surrounded this question was probably a good deal increased by arguments which assumed that no distinction existed between the claim to question a foreign judgment on the merits, and to question it upon the ground of fraud, or want of jurisdiction, or that it was unduly obtained. For instance, in the report of *Don v. Lippman*, 5 Cl. & F. 1, the proposition that the grounds of a foreign judgment are examinable here is laid down generally, but in truth the judgment was excluded from

Former confusion between
impeachment
of foreign
judgment on
the merits
and other
grounds.

Effect of
foreign
judgments.

consideration altogether, upon the ground that the defendant was an enemy to the country where it was given, not within the jurisdiction of the court, and without any notice of the suit or opportunity of defending himself against it. In *Houlditch v. Donegal*, Lord Brougham does not seem to have had the distinction fully present to his mind.

Pendency of
foreign
proceedings no
bar here.

The pendency of an appeal in the foreign court against the judgment cannot be set up as a bar to an action on it here; although it may afford ground, in some cases, for the equitable interposition of the English court to prevent the possible abuse of its process; *Scott v. Pilkington*, *supra*; *Messina v. Petrocchino*, L. R. 4 P. C. 144; see *per* Lord Watson, *Nouvion v. Freeman*, 15 App. Cas. 1, 13. *Similiter*, of an action pending in a foreign tribunal at the date of the action brought in this country; *The Delta*, 1 P. D. 393; *Phosphate Co. v. Molleson*, 1 App. Cas. 780; *Norton v. Florence Land Co.*, 7 Ch. D. 332; *The Christiansborg*, 10 P. D. 141.

Foreign judg-
ment must be
conclusive
where pro-
nounced.

There is no doubt that a foreign judgment cannot be conclusive here, which is not shown to be so in the country where it was pronounced. That was decided in *Plummer v. Woodburne*, 4 B. & C. 625, where the foreign judgment was pleaded, and the plea held bad, on the ground that its conclusiveness in the country where it was given was not alleged on the record. This decision was recognised in *Smith v. Nicolls*, 5 B. N. C. 222, and *Frayes v. Worms*, 10 C. B. N. S. 149.

What is a
conclusive
judgment.

In *Nouvion v. Freeman*, 15 App. Cas. 1, where it was held that a "remate" judgment obtained in Spain is not conclusive evidence in this country of the existence of the debt, Lord Herschell said: "It must be shown that in the court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties. If it is not conclusive in *the same court* which pronounced it, so that, notwithstanding such a judgment, the existence of the debt may between the same parties be afterwards contested in that court, and, upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judg-

ment to claim a decree from our courts for the payment of that debt;" 15 App. Cas. 9.

A fortiori, a foreign judgment cannot be held conclusive here, where the proceedings are so defectively set out that the point which it is sought to establish by it does not clearly appear to be decided; *Obicini v. Bligh*, 8 Bing. 335, 351; *Sadler v. Robins*, 1 Camp. 253; *Callandar v. Dittrich*, 4 M. & Gr. 68. Also the pleadings, before the Judicature Acts, must have shown that the proceedings in the foreign court were taken for the same purpose as the suit in which the judgment is sought to be made conclusive; for even though the issue were the same, if the object of the suit were different, the decision would not be conclusive; *Behrens v. Sieveking*, 2 My. & C. 602; see *ante*, p. 761. The plea need not however have set out the proceedings at length; *Ricardo v. Garcias*, 12 Cl. & F. 368.

There are, however, some cases in which the effect in evidence of the judgment of a foreign court is regulated by different considerations from the above,—I mean cases in which the judgment is *in rem*, or concerns something in its nature *local*.

The commonest instance of the effect of the judgment of a foreign court of competent jurisdiction *in rem* is afforded by the sentences of Courts of Admiralty on questions of prize. "That these sentences are admissible and conclusive evidence of the fact they decide, it seems not safe now to question," were the expressions of Le Blanc, J., in *Lothian v. Henderson*, 3 B. & P. 517; and this opinion is amply borne out by prior and subsequent authorities; see *Hughes v. Cornelius*, *ante*, p. 723; *Kindersley v. Chase, Park, Ins.*, 8th ed., 743; *Bolton v. Gladstone*, 5 East, 155, 160; *Baring v. Clagett*, 3 B. & P. 201, 214; *Christie v. Secretan*, 8 T. R. 192, 196. They are not, however, pleadable by way of estoppel; see *Hobbs v. Henning*, 17 C. B. N. S. 791, *infra*, p. 784.

Such a sentence, being *in rem*, binds the rights of third persons. Indeed, the question as to the effect of such proceedings has usually arisen between persons not parties to them; for, in most of these cases, the question has been between the underwriter and the assured, and the point in issue, whether the latter's warranty of neutrality has been complied with; to prove the non-compliance with the warranty, the sentence of a foreign court condemning the vessel as enemy's property has been produced, and has been admitted to be conclusive.

In *Kindersley v. Chase, Park, Ins.*, 8th ed., 747, Grant, M.R.,

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foreign
judgments.

And point
must clearly
appear to
have been
decided.

Judgments *in
rem*.

Sentence of
Courts of
Admiralty on
questions of
prize.

Sentence *in
rem* binds
third parties.

*Kindersley v.
Chase.*

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foreign judgments *in rem*.

said: "Now, it is quite clear that, from the time of Lord Hale down to the present period, it has been settled that a sentence of condemnation in a Court of Admiralty is conclusive. When it proceeds on the grounds of enemies' property, it is conclusive that the property does belong to enemies, *not only for the immediate purpose of such a sentence, but it is binding on all courts and as against all persons* It was admitted that the sentence of a Court of Admiralty proceeding *in rem* must bind all parties,—must bind all the world."

Bolton v. Gladstone.

"Since the judgment of the House of Lords in *Lothian v. Henderson*," said Lord Ellenborough, delivering the judgment in *Bolton v. Gladstone*, 5 East, 155, 160, "it may now be assumed, as the settled doctrine of a court of English law, that all sentences of foreign courts of competent jurisdiction to decide questions of prize are to be received here as conclusive evidence, in actions upon policies of insurance, upon every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially."

Question whether the judgment be one on the point in controversy.

This doctrine being, therefore, well established, the question in later cases has become, not whether the judgment of the foreign court be in its nature conclusive, but, whether it be a judgment upon the point in controversy: since it is obvious that it would be absurd to treat it as conclusive upon points which it did not involve, or which, although they may have been involved in it, yet, from the manner in which it is framed, do not appear to have been so.

Bernardi v. Motteux discussed by Lawrence, J.

This view was acted on by the K. B. in *Bernardi v. Motteux*, 2 Dougl. 575, which is thus commented upon by Lawrence, J., in *Lothian v. Henderson*, 3 B. & P. 527: "*Bernardi v. Motteux* is the original authority upon which all the other cases upon this subject have been founded. In that case the determination of a Court of Admiralty in France was held not conclusive against a warranty of neutrality. And there Lord Mansfield stated the difficulty to be, the not being able to collect the ground on which the French Court of Admiralty went, whether that of enemies' property, or that of the papers being thrown overboard contrary to an *arrêt* of that country: and, thinking that enough did not appear on the sentence to ascertain precisely upon what it was founded, and, that the French Admiralty might have proceeded on the ground of the papers being thrown overboard, determined in favour of the plaintiff, on the ambiguity of the sentence."

In a subsequent case, *Saloucci v. Woodmass*, Park, Ins., 8th ed., 727, Lord Mansfield laid it down as a rule, that, where no other ground appeared, the condemnation of a ship *as prize* must be taken to have proceeded on the ground of enemies' property, and distinguished that case from *Bernardi v. Motteux*, as there another ground, namely, the *arrêt*, appeared, on which the condemnation might have proceeded.

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foreign judg-
ments *in rem*.

Saloucci v.
Woodmass.

Consonant with *Bernardi v. Motteux* is *Pollard v. Bell*, 8 T. R. 434, where the subject will be found largely discussed; *Bird v. Appleton*, Id. 562; *Calvert v. Bovill*, 7 Id. 523; *Horney v. Lushington*, 3 Camp. 85; *Fisher v. Ogle*, 1 Id. 418; *Dalglish v. Hodson*, 7 Bing. 495; and *Hobbs v. Henning*, *infra*, p. 784.

In *Baring v. Clagett*, 3 B. & P. 215, Lord Alvanley thus gave the history of the decisions upon this part of the subject:—"It was once doubted by Lord Kenyon, in *De Souza v. Ewer*, whether the mere fact of condemnation *as prize* was not, of itself, conclusive against the warranty of neutrality, though special grounds of condemnation appeared upon the sentence not warranted by the law of nations, for it was considered that a contrary doctrine would impute bad faith to the tribunal by which the condemnation was pronounced: and, unless such special grounds appear, the sentence is undoubtedly conclusive. Accordingly, in *Saloucci v. Woodmass*, where a ship warranted neutral was condemned *as good and lawful prize*, that single allegation in the sentence was deemed sufficient to negative the neutrality of the ship, because, *as no special ground of condemnation appeared*, the court held themselves bound to suppose that it proceeded on the just and lawful ground of the ship being enemies' property. But, in *Bernardi v. Motteux*, the court considered the sentence conclusive as to everything it professed to decide, yet held themselves at liberty to examine whether the ground on which the sentence proceeded actually falsified the warranty contained in the policy. Then follows a series of authorities in which the courts have determined that, if the condemnation does not plainly proceed upon the ground of enemies' property, or that of the ship not having complied with subsisting treaties between her own country and that of the capturing power, *but* on the ground of regulations arbitrarily imposed by the latter, to which neither the government of the captured ship nor the other powers of Europe have been made parties, such a condemnation shall not be admitted as conclusive against a warranty of neutra-

Judgment of
Lord Alvanley
in *Baring v.*
Clagett.

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foreign judgments *in rem*.

Rules
deducible as
to sentence
in rem
of foreign
Court of
Admiralty.

lity.” And his lordship cited *Mayne v. Walter*, Park, Ins., 8th ed., 730; *Pollard v. Bell*, 8 T. R. 434; *Bird v. Appleton*, Id. 562; and *Price v. Bell*, 1 East, 663.

Upon the whole, the rule appears to be—1. The sentence of a foreign Court of Admiralty of competent jurisdiction, pronounced *in rem*, is conclusive against all the world, as to the existence of the ground on which the court professes to decide.

2. It would seem from *Saloucci v. Woodmass*, that such a court shall *perhaps*, where it states no ground of decision, be presumed to have decided on the ground which would warrant its decision in the terms in which it is pronounced; and that, therefore, where a vessel is condemned *as prize*, the court would be presumed to have condemned it on the proper ground, namely, an infraction of neutrality, or, what amounts to the same thing, a breach of treaty. But,

3. This presumption ends, where it appears doubtful upon the face of the sentence itself, whether the ship was not condemned upon some other ground; such, for instance, as the infraction of a mere local ordinance. In such a case, it is apparent that the words *as lawful prize*, even if used, may be, and probably are, a mere misapplication of terms, so far as they may lead to the inference that a breach of neutrality has been committed.

Quære as to
rule 2, as
above.

It must, however, be confessed that, notwithstanding Lord Mansfield’s decision in *Saloucci v. Woodmass*, and Lord Alvanley’s seeming approval of it in *Baring v. Clagett*, it appears probable that the second of the above propositions may hereafter be successfully questioned; for certainly it seems scarcely compatible with some of the expressions of judges in later cases. Thus, in *Dalglish v. Hodson*, Tindal, C.J., said: “The general law upon this subject is well known, that the sentence of a foreign Court of Admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, where such fact appears on the face of the sentence free from doubt and ambiguity. But it is at the same time as well established that, in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly upon the face of the sentence. *It must not be collected by inference only.*” Now, certainly, in a case like *Saloucci v. Woodmass*, the ground of decision not being expressed, must, if collected at all, be collected *by inference*. Indeed, it seems almost

impossible to reconcile the decision in *Saloucci v. Woodmass*, with that in *Fisher v. Ogle*, 1 Camp. 418 ; and, if a choice is to be made between the two decisions, the feeling of the courts seems certainly to be at present against extending the effect of foreign sentences.

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ments *in rem.*

In *Fisher v. Ogle*, to falsify a representation that the ship was American, a sentence of the Admiralty Court of Martinique was produced, which stated "that it resulted evidently from the papers on board, that the expedition of the ship Juno, her cargo, and her operations on the coast of Africa, were for account of G., merchants of London, who had, to mask the English property of this outfit, borrowed the American flag and passport of the ship Juno, and taken for their agent and partner in the expedition Captain F., furnished with a certificate of citizen of the United States." The sentence then went on to declare *as good and valid prize* the slave-ship Juno, and to confiscate the ship and cargo to the captor's profit. Lord Ellenborough said : "We show a sufficient respect to French sentences, if we attach credit in our courts to what they distinctly say. It is often painful to go this length, considering the piratical way in which they proceed. But this sentence does not say that the ship was *not American*, and it is not to be considered as evidence of what it does not specifically affirm. I dare say such sentences will be positive enough in future, since those who frame them are disposed to consider everything as good prize against all mankind. When they do speak out, I will give them the same effect here which they receive in other places. But there is no proof, in the present case, that the property was not American, though such an inference might be drawn from certain indirect statements in the sentence now presented to us." A motion for a new trial was refused, and his lordship said : "It is by *an overstrained comity* that these sentences are received as conclusive evidence of facts which they positively aver, and upon which they specifically profess to be founded."

Fisher v.
Ogle.

This case was decided in 1808. On a subsequent occasion Lord Ellenborough expressed similar sentiments, saying : "I am by no means disposed to extend the comity which has been shown to these sentences of foreign Admiralty Courts. I shall die, like Lord Thurlow, in the belief that they never ought to have been admitted. The doctrine in their favour rests on an authority in Shower" (*Hughes v. Cornelius*, ante, p. 723), "which does not fully support it, and the practice of

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foreign judgments *in rem*.

*Hobbs v.
Henning.*

receiving them often leads, in its consequences, to the greatest injustice." (See *Donaldson v. Thompson*, 1 Camp. 429.)

The observations of Lord Ellenborough in *Fisher v. Ogle* were cited by the court in *Hobbs v. Henning*, 17 C. B. N. S. 791, in a judgment of much importance, in which the rule that the sentence of a prize court is not conclusive as to the ground of condemnation if there be any ambiguity as to what that ground is, was distinctly recognised, and it was laid down by two of the judges that judgments of this description, though ordinarily conclusive as *evidence*, cannot be pleaded as an *estoppel*.

"The rule," said the court, "making the decision of a court which creates the *status* of a person or thing conclusive upon all persons as to the existence of that *status*, has been regarded as salutary. Sentences of nullity of marriage in the Ecclesiastical Courts, of forfeiture in the Exchequer, of settlement of paupers by the quarter sessions, and of prize in prize courts, are examples. In *Hughes v. Cornelius*, the rule was applied within salutary limits, where, in trover for a ship by the former owner, the sentence of a prize court was held conclusive to show that the property had been changed; see *Doe v. Oliver*, in Smith's Leading Cases, where the whole subject is fully considered with much learning and lucid arrangement. But the rule making the finding of a judge, upon any matter of fact upon which he professes to form his judgment, conclusive upon all the world, has been supposed to be anomalous, and to produce pernicious results; see Lord Eldon's opinion in *Lothian v. Henderson*, 3 B. & P. 499, to that effect. Also in *Geyer v. Aguilar*, 7 T. R. 681, 696, Lord Kenyon speaks of the rule as a source of the greatest injustice." The court then cited Lord Ellenborough's words as given above, and proceeded: "We would further refer to *Dalglish v. Hodson*, 7 Bing. 495, where Tindal, C.J., says that the sentence of a prize court is not conclusive as to the ground of condemnation, *if there be any ambiguity as to what the ground is*. It must not be left in uncertainty whether the ship was condemned on a ground which would be just by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. Although these sentences must be received in evidence, still the precedents show that, when received, they have been carefully examined, for the purpose of seeing whether the matter of fact in proof of which they are adduced

was clearly and certainly found by the judge whose sentence is relied on." The court then applied these principles to the pleadings before them, and held, on examining a sentence of a United States prize court, that certain facts in respect of which it was pleaded as an estoppel were not the grounds on which the condemnation had been founded.

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foreign judg-
ments *in rem*.

Hobbs v.
Henning.

In the same case Erle, C.J., and Byles, J., stated (Keating, J., neither assenting nor dissenting), that they were of opinion that the pleadings in the cause, which set up the finding of some facts in the course of the adjudication of the prize court *by way of estoppel*, were bad, since such matters cannot be pleaded in this form, even where the judgment would, if adduced in evidence, be conclusive proof of the facts so found. "Although the cases," said they, "are numerous in which the evidence has been admitted, still there is no precedent for the plea of the fact as an estoppel that we have been able to find. The principle on which the evidence was held admissible is not clear. Lord Eldon, in *Lothian v. Henderson*, says it was introduced at first against the insurers to prove the loss, and was afterwards used by the insurers for their defence. Lord Ellenborough, in *Fisher v. Ogle*, speaks of it as a matter of comity between the two courts. Such evidence does not fall within any legal description of matter of estoppel; nor is it guarded by the safeguards against abuse which restrict matters of estoppel in respect of parties, and of subject-matter." The learned judges then cited that part of the judgment of Knight Bruce, V.-C., in *Barrs v. Jackson*, which is extracted above, p. 759, and which lays down the limitations on the rule as to the admissibility of ordinary judgments in evidence, and proceeded: "The admissibility of the judgments of prize courts upon matters of fact is not restricted within these limits; and although we are bound here to hold that they are admissible, so far as the decided cases have established their admissibility, yet beyond that limit we would not go; and we consider the attempt to use the judgment as an estoppel does transgress that limit, there being no precedent for it. In relying upon the absence of any precedent, *we do not consider that this objection is confined to matter of form. It restricts in some degree the tendency of such evidence to defeat real truth by technical proof; and it may have the effect of preventing the foreign judgment from being misunderstood or misapplied. If the judgment can only be adduced in evidence, and is not*

Effect of
foreign judgments *in rem*.

Sentence of
foreign court
not having
jurisdiction
has no effect.

Two modern
decisions as
to judgments
in rem.

Cammell v.
Sewell.

pleadable as an estoppel, the meaning may be ascertained by adducing in evidence the preliminary proceedings, and other matters referred to in the judgment."

It is plain that, unless the foreign court be one of competent jurisdiction, its sentence, far from being conclusive, can have no effect at all. Thus, it is a settled point of international law that the prize court of one belligerent cannot sit in the dominions of a neutral power. "Its doing so," as Sir William Scott observed in *The Flad Oyen*, 8 T. R. 270, n., "is a licentious attempt to exercise the rights of war within the bosom of a neutral country." Accordingly, to the sentence of such a tribunal our courts attribute no credit or authority whatever; *Havelock v. Rockwood*, 8 T. R. 268; *Donaldson v. Thompson*, 1 Camp. 429; which cases overrule *Smith v. Surridge*, 4 Esp. 25. See the distinction taken in *Oddy v. Bovill*, 2 East, 473, between a prize court held in the dominions of a neutral, and one held in those of a co-belligerent.

Two other important decisions upon the effect of judgments *in rem* by foreign courts, which illustrate the rules mentioned above, must be noticed at some length, but more particularly as illustrating the important question which frequently arises as to whether the foreign proceedings sought to be enforced are to be deemed *in personam* or *in rem*. The first case is *Cammell v. Sewell*, 3 H. & N. 617, 5 Id. 728; the second, *Castrique v. Imrie*, 8 C. B. N. S. 1, 405, L. R. 4 H. L. 414. *Cammell v. Sewell* came before the Court of Exch. on a special case, upon which the following facts appeared. The action was brought by underwriters, to recover the value of a cargo of deals which had been abandoned to them by the cargo-owners, after the ship carrying the deals (a Prussian ship) had got on shore on the coast of Norway. After the abandonment and its acceptance by the underwriters, the deals had, however, been safely landed, and had subsequently been unnecessarily sold by public auction, (notwithstanding the protest of the underwriters' agent), to the British vice-consul, Clausen, under whom the defendants claimed. This sale had been made with the assent of the master, and had been conducted according to the law of Norway by a public officer, after a survey of the vessel and cargo; and there was evidence on the special case to show that the act of survey and public auction were judicial proceedings, from which by the law of Norway appeals lie, and that, by that law, such a sale by the

master transfers the property in the cargo. After the sale, the underwriters had instituted in the superior court of Trondhjem a suit against the master, his agent, and the buyer of the deals, praying that the public auction should be disavowed, and that the buyer should give up the goods *in specie* or make compensation for the loss. Judgment had been afterwards given in this suit by the superior court confirming the sale, and absolving the parties sued from the claims made against them.

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ments *in rem*.

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Upon these facts the Court of Exch. was of opinion, that the underwriters were concluded by the judgment of the court in Norway as to the validity of the sale, and that they could not recover the value of the cargo from the persons claiming under the sale by auction. After observing that it was plain that there had been no necessity to justify the sale, and that, assuming the law of Norway to differ from that of England on this subject, a difficult question had been raised, whether the English or the Norwegian law was to prevail, the court proceeded: "We think, however, that the case must be decided upon the judgment in the superior diocesan court of Trondhjem, and that it is not necessary for us to express any opinion on that point. After much consideration we are of opinion that the parties to this suit are concluded by the judgment of that court. It is clear that that suit was instituted by the agent of the plaintiffs, and as against them the court must be taken to have had jurisdiction; indeed, there is no evidence that it had not. The defendants are the consignees of the deals from Clausen, and are defending the present action upon his right and title. We therefore think that the parties to the present action were privies to the suit in Norway. The remedy sought was in the nature of one *in rem*, viz., that the auction should be disavowed, and the deals delivered up *in specie*, if it were possible to do so. The judgment was, that the public auction was to be confirmed. *This seems to us to be in the nature of a judgment in rem, and such a judgment finally determines the question.* The law upon the subject will be found in the note to *The Duchess of Kingston's Case*, 2 Sm. L. C. The judgment of the superior diocesan court in substance was, that the sale was valid, and the property in the deals passed; there is, therefore, an adjudication upon the *status* of the thing adjudicated upon, and this seems to us to conclude all parties and privies to the suit from saying that the *status* is not such. It is similar to

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*Cammell v.
Sewell.*

the condemnation of goods in the Exchequer, and the sentence of a prize court, both of which are conclusive as to the ownership of the goods or ship. It was said that this judgment could be avoided for fraud. This is so, if there were fraud found to affect it, but there is none. It is impossible to say there was any fraud in the court. Indeed, we see no reason to believe that the judgment was not perfectly *bonâ fide*. If the defence to the suit by the master or his agent, and Clausen, can be said to be fraudulent, that is not the species of fraud to affect the judgment. Such fraud must be a fraud in the procuring of the judgment, such as collusion or the like, or fraud in the court itself. It was also said that the judgment ought to have been pleaded. But this is not so. If it be a judgment *in rem*, it is conclusive evidence upon the plea that the goods were not the plaintiff's, and there is no necessity to plead it. But, assuming that the judgment is not one in the nature of a judgment *in rem*, it seems to us, nevertheless, it must be taken as conclusive. The plaintiffs thought fit to seek their legal remedy in what must be taken to be a foreign court of competent jurisdiction, and judgment has been given against them. We think they are conclusively bound by it. *Interest reipublicæ ut sit finis litium.*"

Judgment of
Court of
Exchequer
affirmed, but
on different
grounds.

Proceedings in error were taken upon this judgment, and it was affirmed by the majority of the Exch. Cham.; but that court stated that it was by no means prepared to agree with the Court of Exch. in thinking that the judgment of the Norwegian court was conclusive as a judgment *in rem*, nor was it satisfied that the defendants in the then action were estopped by the judgment of the Norwegian court, or by what was relied on as a judicial proceeding at the sale. The principle upon which the Exch. Cham. thought that the judgment below ought to be affirmed was, that the evidence showed that according to the law of Norway the sale conferred a good title on the buyers, and that, as had been observed by Pollock, C.B., in the court below, "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere." Byles, J., however, dissented from this judgment, being of opinion that the law of Norway, as set up by the defendants, was of so dangerous and unusual a character, that it ought not to be recognized by other countries as giving validity to a contract of sale; and it may be collected from the judgment of the majority

of the court that they would not have applied the principle upon which their decision proceeded, had they thought that the Norwegian law was of a barbarous or monstrous character.

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foreign judg-
ments *in rem*.

In *Castrique v. Imrie*, which was an action brought in the Common Pleas, the principles laid down in the earlier cases with reference to the binding effect of judgments *in rem* were fully recognized; indeed, they were carried very far; and a difference of opinion again prevailed between the Court of Error and one of the superior courts, as to whether the proceedings of a foreign court were to be deemed to be *in rem*, or *in personam*.

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Imrie.

In this case, a British subject, the owner of a registered British ship, transferred her to mortgagees by bill of sale, whilst she was on a voyage, and several subsequent transfers were made from mortgagee to mortgagee. Before the first transfer the master had, whilst at Melbourne, drawn a bill on the owner for the disbursements of the ship, which bill was however never accepted, and was dishonoured at maturity. The ship on her return voyage put in at Havre, and thereupon the holder in England of the dishonoured bill, to whom it had been indorsed by the payees at Melbourne, indorsed it to a French firm at Havre, who commenced proceedings in the Tribunal de Commerce of that port against the master and *against the ship*. The master appeared, but did not defend the suit; and the court thereupon condemned the master, “*en sa qualité de capitaine, et par privilège sur le navire*” (an expression which was construed in the Exch. Cham. and the H. L. to mean that the ship was condemned also by way of maritime lien), to pay the amount of the bill, and declared him free from arrest, to which otherwise he would have been liable. Up to this point the owner and mortgagees of the ship had not been made parties to the suit, nor was this necessary by French law; but afterwards the owner and the first mortgagee were summoned to the Civil Tribunal of the district in which the Court of Commerce was situate, in order to give them opportunity of resisting the judgment directed against the ship. They did not appear, and the original decision of the Court of Commerce was confirmed; and it was ordered that the ship should be sold by auction. At a later period, the plaintiff, who was the last mortgagee of the ship, but who had not at that time registered the transfer to him, prosecuted a suit before the Civil Tribunal

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foreign judgments *in rem*.

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at Havre, to replevy the ship, and release her from custody. In this suit the Civil Tribunal, misconceiving the law of England, and deeming, erroneously, that by that law no valid transfer could be made of a ship, to the prejudice of creditors, whilst she was on a voyage, unless the sale appeared on the ship's papers, dismissed the plaintiff's claim, and upheld the original seizure of the ship. This judgment was affirmed on appeal by the Court of Appeal at Rouen, which adopted the reasoning on which the judgment of the Havre court was based, although evidence was laid before that court as to the real state of the English law; and the ship was subsequently sold by auction.

Under these circumstances the Court of Common Pleas thought that the proceedings in the French courts were *in personam*, that the judgments were consequently examinable, and that the decisions of those courts were clearly erroneous, since they proceeded upon principles unknown to the English law, and not shown to form part of the French law. This judgment was, however, reversed in the Exch. Cham., the judges of that court being of opinion that the proceedings of the French tribunal were *in rem*, and that "the authorities clearly establish that a judgment *in rem* of a foreign tribunal, turning on a question of English law, cannot, though erroneous, be questioned by a court in this country, any more than if, turning on the law of the country to which the tribunal belonged, it had been erroneous with reference to the latter." On appeal to the H. L. the judgment of the Exch. Cham. was affirmed. Keating, J., delivered an opinion adhering to the view taken by the Court of C. P., that the judgment was not *in rem*, but agreeing in the result on the authority of *Cammell v. Sewell*, *supra*.

It must be observed that both the Exch. Cham. and the H. L. considered, looking at all the facts, and referring to some other legal points in the case, which it is not necessary to mention in detail, that there had been in the French tribunals *no intentional disregard of the law of England*. See the cases on this point cited *ante*, pp. 769, 770.

Question
whether proceedings *in rem* or *in personam*; *per*
Cockburn,
C.J.

The following observations of Cockburn, C.J., in the Exch. Cham., relate to the question (one which it is often difficult to solve in practice), whether the proceedings of the foreign court were *in personam* or *in rem*: "It is true that the suit out of which this judgment arose appears to have been in its inception a proceeding *in*

personam, so far as the master of the vessel was concerned ; but it was, at the same time, in terms a suit *against the ship* ; and in this respect it appears to us clear that it was a proceeding *in rem*. It is plain, from the narrative of the proceedings set forth in the case, that, according to the French law, a mixed suit, directed both against the master and against the ship, may, after judgment obtained against the master, be converted into a suit against the ship alone. For, the master having admitted the debt and consented to judgment, and the Tribunal de Commerce having condemned him in his capacity of master, and also the ship by way of maritime lien (for such . . . must be taken to be the sense and effect of the words '*par privilège*'), all further proceedings against the master are dropped. He is declared free from arrest, to which, as a foreigner liable to a Frenchman on a bill of exchange, he would otherwise have been subject, and the subsequent proceedings before the Civil Tribunal are directed against the ship alone. At this stage, the owners of the vessel are for the first time made parties to the suit, not for the purpose of fixing them with any personal liability, but to afford them an opportunity of resisting a judgment directed specifically against the vessel.

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“ It is, no doubt, true, that a judgment of this sort, which simply decrees the sale of a particular chattel, to satisfy a money demand, hardly falls within the strict definition of a judgment *in rem*, inasmuch as it does not determine the *status* of the chattel with reference to property, or vest the property at once in the claimant, as a condemnation of the Court of Exchequer in a revenue cause vests the property in the crown, or the sentence of a Court of Admiralty in a matter of prize vests the property in the captors. But it is strictly analogous to the sentence of a Court of Admiralty on a claim of salvage, or in a suit on a bottomry bond. In both the latter there is a money demand, on which the court first adjudicates, and in satisfaction of which it decrees the sale of the ship. If such a decree is a judgment *in rem*, it is difficult to discover any ground for saying that the decree ordaining the sale of this ship is to be considered in the light merely of an execution to satisfy a judgment establishing a pecuniary liability. Indeed, it seems impossible to find two proceedings more closely analogous than the proceeding on a bottomry bond, and the present suit in its ulterior stage. Both are proceedings on the hypothecation

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Imrie.

or quasi hypothecation of a vessel: in both a money liability has first to be established: in both the remedy is by a judgment decreeing the sale of the vessel. Except that, in the one case, the hypothecation is by express agreement under a particular instrument, and that, in the other, it arises by the operation of the French law on a debt incurred on behalf of the ship, the proceeding and the result are in substance essentially the same.

“Now, the sentences of the Court of Admiralty in the matter of maritime liens have always been considered as judgments *in rem*. And in one sense they properly are so; for the purpose of the suit, and the effect of the judgment, are to afford a remedy, not by execution against the person or the general estate of the defendant, but by the appropriation of a specific chattel to satisfy the plaintiff's claim. Being unable to see any distinction between such a judgment and the present, the only conclusion I can arrive at is, that this judgment is a judgment *in rem*.”

Per Blackburn,
J.

In delivering the opinion of the judges in the *H. L.* Blackburn, J., said (*L. R.* 4 *H. L.* p. 429), “We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in Story on the Conflict of Laws, sect. 592. We think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the state under the authority of which the court sits; and secondly, whether the sovereign authority of that state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.”

Foreign judgment *in rem*
conclusive till
reversed.

An attempt was made by the defeated plaintiff in *Castrique v. Imrie*, to avoid the effect of this decision, by suing in the *Q. B.* the English holder of the bill of exchange, alleging in his declaration that he had conspired with the subsequent French indorsees to indorse to them the bill without value, in order that they might attach the ship in France by fraudulently representing themselves as holders for value. The result of this action strongly illustrates the binding effect given by our courts to judgments *in rem*, for, although these facts were admitted on demurrer, the court held the declaration

bad, since, so long as the French judgment *in rem* remained unreversed, it was conclusive on everyone, and no action would lie here in respect of the fraudulent conduct described in the declaration. The court observed that it was not necessary to say what would have been the effect had the declaration shown that, by the contrivance of the defendants, the proceedings had been such that the plaintiff had had no opportunity to appear in the French courts and to dispute there the allegations made against him; *Castrique v. Behrens*, 30 L. J. Q. B. 163; see further, as to when a foreign judgment may be treated as *in rem*, *The City of Mecca*, 6 P. D. 106; see also *Meyer v. Ralli*, 1 C. P. D. 358; and *Simpson v. Fogo*, 32 L. J. Ch. 249, *per* Wood, V.-C.

Effect of
foreign judg-
ments *in rem*.

Another instance of the effect of the sentence of a foreign court *in rem* is afforded by the decree of such a court establishing or nullifying a marriage. Such a sentence would, it is apprehended, be conclusive, *if pronounced on a marriage within the jurisdiction of such court to adjudicate upon*. Lord Hardwicke's observations in *Roach v. Garvan*, 1 Ves. sen. 157, 159, are often cited on this subject: "As to the fact of the marriage. . . . it has been argued to be valid from being established by the sentence of a court in France *having proper jurisdiction*. And it is true that, *if so, it is conclusive*, whether in a foreign court or not, from the law of nations in such cases; otherwise the rights of mankind would be very precarious and uncertain."

Foreign de-
crees as to
marriage.

In *Boucher v. Lawson*, Ca. temp. Hardw. 9, Lord Hardwicke mentioned that "in the time of Car. 2, a suit was brought on a contract of marriage, and the sentence of the Ecclesiastical Court at Turin was given in evidence, and allowed to be conclusive." This appears to be the same case as *Ex p. Cottington*, extracted in 2 Swanst. 326, n., from Lord Nottingham's MSS., whence it appears that on "June 10, 30 Car. 2 (1678), Cottington presented a petition to the lords of parliament, praying to be relieved against a sentence given by the delegates in a matrimonial cause, wherein they had adjudged. . . . that Signora Angelina Margarita Gallina, a very lewd woman, was the petitioner's lawful wife." The ground of the petition was, that the Signora had another husband living at Turin; and that though she had been divorced from that other husband by sentence of the Archbishop of Turin, yet that the sentence of divorce was invalid. Lord Nottingham, however, stated his opinion to be clear that the sentence was not examinable in this

Boucher v.
Lawson.

Effect of
foreign decrees
as to marriage.

Whether
decree of
foreign court
annulling
English
marriage on
grounds for
which it could
not be
declared void
here, con-
clusive here.

Sinclair v.
Sinclair.

Macarthy v.
De Caix.

country, and that the Court of Delegates had acted right *in holding it conclusive*.

It appears certain (it may be remarked) that this divorce was one between two foreigners *married abroad*; and it has been laid down by high authority that a foreign court has no jurisdiction to annul a marriage solemnised in this country, on grounds upon which it could not be declared void by the courts here; *Sinclair v. Sinclair, infra*. But the decision of the H. L. in *Harvey v. Farnie*, 8 App. Cas. 43 (*post*, p. 796), establishes that the mere fact of a marriage having been solemnised in this country does not prevent an English court from recognising the validity of a divorce decree in respect of it pronounced by a court of the country in which the husband was domiciled both at the time of the marriage, and thenceforth until the date of the decree, although by the law of England the circumstances would have been insufficient to give the right to a divorce.

“Undoubtedly,” said Lord Stowell, in *Sinclair v. Sinclair*, 1 Hag. Con. 297, “a sentence of separation in a proper court for adultery would be entitled to credit and attention in this court; but I think the conclusion is carried too far, when it is said that a sentence of nullity of marriage is necessarily and universally binding in other countries. Adultery and its proofs are nearly the same in all countries: the validity of marriage, however, must depend, in a great degree, on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnised, would carry with it great authority in this country, but I am not prepared to say that a judgment of a third country on the validity of a marriage *not within its territories, nor had between subjects of that country*, would be universally binding. For instance, the marriage alleged by the husband is a French marriage. A French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a court at Brussels on a marriage in France would have the same authority, much less on a marriage celebrated here in England.”

In *Macarthy v. De Caix*, 3 Hag. Ecc. 642, n., Tuke having married in England, was divorced in Denmark. The wife came to England and died; the husband took out letters of administration to her in England and, upon his death, there was a suit in Chancery between his executors and her next of kin, relative to the property. Lord Brougham

decreed in favour of the executors, observing that the English marriage could not be annulled by the Danish law. But this case must now be considered as of no authority; see *per* Lord Selborne, *Harvey v. Farnie*, 8 App. Cas. p. 52.

Effect of
foreign decrees
as to marriage.

No question of domicile seems to have been raised either in this case, or, as far as we can judge from the report (on which, however, Dr. Lushington has animadverted as extremely meagre) in *R. v. Lolley*, R. & R. 237, where Lolley was convicted of bigamy, for having married Helen Hunter during the life of Anne Sevaia, to whom he had been previously married, but from whom he had been divorced in Scotland. The point was reserved for the opinion of the twelve judges, who are stated to have been unanimously of opinion "that no sentence or act of any foreign country or state could dissolve an English marriage *a vinculo matrimonii*, for ground on which it was not liable to be dissolved *a vinculo matrimonii* in England."

R. v. Lolley.

However, though the rule is thus broadly stated, the H. L. in *Harvey v. Farnie*, 8 App. Cas. 43, treated *Lolley's Case* as one in which the domicile of the parties was admittedly English, and the rule as applicable only to the particular circumstances of the case, thus establishing the importance of the distinction adverted to by Dr. Lushington in his elaborate judgment in *Conway v. Beaseley*, 3 Hag. Ecc. 639. That case itself was decided upon the authority of *Lolley's Case*, from which it was impossible to distinguish it. But Dr. Lushington said that, in his opinion, the question of domicile *might*, if it arose, form an important and distinguishing feature. "A case," said he, "in which all the parties are domiciled in England, and resort is had to Scotland (with which neither of them has any connection), for no other purpose than to obtain a divorce *a vinculo*, may possibly be decided on principles which would not altogether apply to a case differently circumstanced, as where, prior to the cause arising on account of which a divorce was sought, the parties had been *bonâ fide* domiciled in Scotland. Unless I am satisfied that every view of this question had been taken, the court cannot, from the case referred to (*Lolley's*), assume it to have been established, as a universal rule, that a marriage had in England, and originally valid by the law of England, cannot, under any possible circumstances, be dissolved by the decree of a foreign court." See also *Warrender v. Warrender*, 9 Bligh, 89, where it was decided that, according to the law of Scotland, parties married in England,

Whether
domicil of
parties affects
the case.

*Conway v.
Beaseley.*

Law of
Scotland

Effect of
foreign decrees
as to marriage.

but domiciled in Scotland, may be divorced by the court of that country. *Geils v. Geils*, 1 Macq. 255, was the case of a domiciled Scotchman marrying an Englishwoman in England. The wife, after a divorce *a mensâ et thoro* in England, was held entitled to proceed for a divorce *a vinculo matrimonii* in Scotland.

Effect of
original
domicil.

Tovey v.
Lindsay.

In *Tovey v. Lindsay*, 1 Dow, 117, 131, which was argued on a Scotch appeal subsequently to *Lolley's Case*, the question was most elaborately discussed; and not merely with reference to the *place of contract*, and to the domicil at the time of the divorce, but with regard, also, to the *forum originis*; the question being raised, whether the Scotch courts, founding their jurisdiction on the *original domicil* of the husband, could divorce *a vinculo matrimonii*, though the marriage was in England, and the actual domicil of both parties was in England. The remarks of Lords Eldon and Redesdale will be found very instructive. Their lordships' impression seems to have been that the divorce was bad; but the case was remitted for further consideration to the court in Scotland. It is pointed out in *Harvey v. Farnie*, 8 App. Cas. 43, that, in sending back the case to Scotland to ascertain the facts as to the parties' domicil, Lord Eldon obviously must have considered that question to have an important bearing upon the validity of the divorce proceedings. In *Harvey v. Farnie*, a domiciled Scotchman married in England an Englishwoman, thus giving her a Scotch domicil, and took her to reside in Scotland. Two years afterwards the wife obtained in Scotland a divorce *a vinculo matrimonii*, on the sole ground of her husband's adultery in Scotland, so that the circumstances would not have warranted a decree of divorce by the law of England. The husband came to England, and married there another Englishwoman, the first wife being still alive. The second wife presented a petition, praying for a declaration that her marriage with the respondent was null and void, on the ground that under the above circumstances the Scotch court had no jurisdiction to dissolve the first marriage in England. The H. L. dismissed the appeal, distinguishing *Lolley's Case*, on the ground that in that case the parties were English. See also *Shaw v. Gould*, L. R. 3 H. L. 55.

Harvey v.
Farnie.

Whether,
where no real
Scotch domicil,
Scotch courts can
dissolve

There is, however, very high authority for saying that where there is no real Scotch domicil, the Scotch courts have no power to dissolve an English marriage, even although the parties have resided in Scotland for such a time as, according

to the doctrine of the Scotch courts, gives them jurisdiction in the matter. See *per* Cresswell, J., in *Brook v. Brook*, 3 Sm. & G. 506; *Robins v. Dolphin*, 1 Sw. & T. 37, 3 Macq. 574, 7 H. L. C. 390; *Tollemache v. Tollemache*, 30 L. J. Matr. 113; *Bonaparte v. Bonaparte*, (1892) P. 402.

Effect of
foreign decrees
as to marriage.

English
marriage.

In *Shaw v. A.-G.*, L. R. 2 P. & D. 156, the petitioner, an Englishwoman, had been married to an Englishman in England, and had resided more than two years in the state of Iowa, but her husband had never resided there; she obtained a divorce in Iowa, and petitioned the English court to declare valid a second marriage solemnised after the divorce, but during the lifetime of her first husband. The court rejected the petition. Lord Penzance said: "In no case has a foreign divorce been held to invalidate an English marriage between English subjects where the parties were not domiciled in the country by whose tribunals the divorce was granted. Whether, if so domiciled, the English courts would recognise and act upon such a divorce appears to be a question not wholly free from doubt, but the better opinion seems to be that they would do so if the divorce be for a ground of divorce, recognised as such in this country, and the foreign country be not resorted to for the collusive purpose of calling in the aid of its tribunals. To my mind it is manifestly just and expedient that those who may have permanently taken up their abode in a foreign country, resigning their English domicil, should, in contemplation of English law, be permitted to resort with effect to the tribunals exercising jurisdiction over the community of which by their change of domicil they have become a part, rather than they should be forced back for relief upon the tribunals of the country they have abandoned. But the enquiry is needless in this case, because it seems to me to be neither just nor expedient that a woman whose domicil is English, and whose husband's domicil is English, should, whilst living separate from him in a foreign state, in which he has never up to the time of the divorce set his foot, be permitted to resort to the local tribunal, and without any notice to her husband except an advertisement, which he never saw and was never likely to see, obtain a divorce against him behind his back." See also *Pitt v. Pitt*, 4 Macq. 627; *Green v. Green*, (1893) P. 89.

Shaw v.
Attorney-
General.

It should be mentioned, however, that in *Niboyet v. Niboyet*, 4 P. D. 1, the C. A., *diss.* Brett, L.J., held, reversing a decision of Sir R. Phillimore, that the mere fact of the

Foreign
domicil of one
party.

Effect of
foreign decrees
as to marriage.

domicil of the husband being French, did not oust the jurisdiction of the English court to pronounce a decree of divorce. In *Harvey v. Farnie*, *supra*, Lord Selborne and Lord Blackburn seem to hesitate to give their approval to this case; and it was again adversely criticized in *Le Mesurier v. Le Mesurier*, (1895) A. C. 517, 530, 536.

Lex loci can-
not validate
marriage pro-
hibited by *lex*
domicilii.

It is important to observe (although to pursue the subject would open questions foreign to the main purpose of this note) that the law of a country in which a marriage is solemnised cannot, it seems, give validity to a marriage prohibited by the laws of the country of the domicil and allegiance of the contracting parties; see *Brook v. Brook*, 3 Sm. & G. 481, 9 H. L. C. 193. The opinion given by Cresswell, J., who assisted Stuart, V.-C., in the decision of this case in the first instance, will be found in 3 Sm. & G. 510, and throws much light upon the authorities and principles which govern these questions. See also *Mette v. Mette*, 1 Sw. & T. 416; *Fenton v. Livingstone*, 3 Macq. 497; and *Sottomayor v. De Barros*, 3 P. D. 1, 5 Id. 94.

Power of
foreign court
over marriage
solemnised
between
strangers or
in a different
country.

The question as to the precise power of a foreign court over a marriage solemnised between strangers, or in a different country, has been much discussed by foreign jurists. It is obvious, at first sight, that it divides itself into a number of distinct cases, each susceptible of different considerations: for the marriage sought to be avoided by the sentence of the foreign court may be (1) between two strangers, and solemnised in a strange country; see *Le Sueur v. Le Sueur*, 1 P. D. 139; or, (2), between two natives of the country where the court sits, but solemnised in a strange country; or, (3), between two strangers, but solemnised in the country where the court sits; and the cases (2) and (3) may be again subdivided; for the marriage of two persons, solemnised in a country to which they are strangers, may be contracted, either according to the forms in use in that country, or else according to a form which some municipal law of their own country has directed shall be sufficient abroad. All the above cases will be again varied by supposing one of the contracting parties to be a native, and the other a stranger; see *Niboyet v. Niboyet*, 4 P. D. 1. A further distinction (which, as we have seen, is treated as important) will arise where the parties, or either party, have become, or were originally, domiciled in the country in the courts of which the validity of their marriage is drawn into question.

It would obviously be incompatible with the plan of this note to involve the reader in such controversies. I will, therefore, simply remark that, whether the judgment of a foreign court be or be not admissible in some of the above cases to prove the *dissolution* of a marriage, still, it is apprehended that the sentence of a foreign court affirming the validity of a marriage would always be admissible here, inasmuch as marriage is a fact proveable by reputation (see *Scrimshire v. Scrimshire*, 2 Hag. Con. 395, 397; *Sinclair v. Sinclair*, 1 Id. 297). And possibly on this ground it might even be made a question whether the void sentence of a foreign court, purporting to dissolve an English marriage, ought not to be received as good *primâ facie* evidence of the existence of the very marriage sought to be dissolved by it.

Effect of
foreign de-
crees as to
marriage.

Judgment
affirming mar-
riage admis-
sible in
evidence.

The reader, if desirous of pursuing the subject, will find it discussed on general principles, and at considerable length in Story's Conflict of Laws. For the present I will but transcribe the observation of Lord Redesdale in *Tovey v. Lindsay*, 1 Dow, 140, viz., "When it is considered that, on the principles of this decision of the court below, any one, from any quarter, might go and establish a domicile in Scotland, and by that means, even in the face of a deed of separation, draw his wife to a Scotch forum, and proceed against her for an absolute dissolution of the marriage, the question must appear to be one of the very greatest importance. If this were to prevail, any person has it in his power to alter the nature of his most solemn engagements. The wife might say *that such was not her contract*; and, if this were held not to be a sufficient answer, the court below might, on the same principle, judge all other contracts by their own law, as well as that of marriage. . . . It could not be just that one party should be able, at his option, to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed." See also the remarks of Lord Penzance in *Wilson v. Wilson*, L. R. 2 P. & D. 435, cited by Sir R. Phillimore in *Niboyet v. Niboyet*, 3 P. D. p. 59; *ante*, p. 797.

Tovey v.
Lindsay, per
Lord
Redesdale.

On the other hand, in *Harvey v. Farnie*, 8 App. Cas. 43, 50, Lord Selborne observed on this question of domicile: "When a marriage has been duly solemnized according to the law of the place of solemnization, the parties become husband and wife. But when they become husband and

Wife takes
husband's
domicil.

Effect of
foreign de-
crees as to
marriage.

wife what is the character which the wife assumes? She becomes the wife of the foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicile than his, which she acquires. The marriage is contracted with a view to that matrimonial domicile which results from her placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad. Therefore it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law—subject to it in respect of the consequences of the matrimonial relation and all other consequences depending upon the law of the husband's domicile."

Le Mesurier v.
Le Mesurier.

In *Le Mesurier v. Le Mesurier*, (1895) A. C. 517, Lord Watson, in delivering the judgment of the Judicial Committee, elaborately examined all the authorities, and stated the general rule to be that "according to international law the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage" (p. 540); and further that "a decree of divorce *a vinculo*, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its *forum*, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority" (p. 528).

Foreign judg-
ments on *local*
matters con-
clusive here,

to same extent
as in the
foreign
country.

With regard to foreign judgments *upon matters in their nature local*, such, for instance, as title to landed property, they, it is apprehended, must be treated as conclusive here, on account of the impossibility of their being effectually questioned. It seems obvious, however, that their effect here must not be greater than would be attributed to them abroad. And, therefore, if the right to land in France were to come incidentally in question before the courts in this country, a judgment in the courts of France between A. and B. could not, it is apprehended, be evidence here between A. and C., unless it were first shown that such a judgment would in France have the effect of a judgment *in rem*, and bind third parties. *Plummer v. Woodburne*, 4 B. & C. 625, and *Smith v. Nicolls*, 5 B. N. C. 208, 222, seem sufficiently to prove this proposition.

Foreign judg-
ments in *penal*
actions.

The courts of this country will not execute the penal laws of a foreign country, or enforce foreign judgments for

penalties recovered in favour of the State. "The rule that the courts of no country execute the law of another, applies not only to prosecutions and sentences for crimes and misdemeanours, but to all *suits in favour of the State* for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenues or other municipal laws, and to all judgments for such penalties;" see *Huntington v. Attrill*, (1893) A. C. 150, 157. See also *ante*, vol. i., pp. 575, 629.

Estoppels by Deed.

"No man," says Lord Mansfield, in *Goodtitle v. Bailey*, 2 Cowp. 597, 601, "shall be allowed to dispute his own solemn deed." Numerous instances of the conclusive effect of a deed are to be found in the books; see *Fairtitle v. Gilbert*, 2 T. R. 169 (and see the distinction mentioned there between a trustee for the public, and other persons; as to which see also *Doe v. Hares*, 4 B. & Ad. 435; and *Doe v. Horne*, 3 Q. B. 766). See also, on the general principle, *Right v. Proctor*, 4 Burr. 2208; *Bonner v. Wilkinson*, 5 B. & Ald. 682; *Johnson v. Mason*, 1 Esp. 89; *Wood v. Day*, 7 Taunt. 646; *Friend v. Eastabrook*, 2 W. Bl. 1152; *Clemow v. Geach*, 6 Ch. 147; *General Finance Co. v. Liberator Society*, 10 Ch. D. 15.

Not only is the deed conclusive, on the party executing it, as to the very point intended to be effected by the instrument (see *Rowntree v. Jacob*, 2 Taunt. 141; *Harding v. Ambler*, 3 M. & W. 279; Co. Litt. 252 a), but also as to facts recited in it (see *Nash v. Turner*, 1 Esp. 217; *Rees v. Lloyd*, Wightwick, 123; *Jones v. Williams*, 2 Stark. 52).

Thus, in *Bowman v. Taylor*, 2 A. & E. 278, the deed recited that the plaintiff had invented certain improvements for which he had obtained a patent; and the defendant, in consideration of a licence to use it, entered into certain covenants, for the breach of which he was sued; it was held that he could not traverse the invention of the plaintiff, and that a plea to that effect was bad upon demurrer. The passage from Co. Litt. 352 b was cited to the effect that "a recital doth not conclude because it is no direct affirmation." However, the court were unanimous in giving effect to the estoppel. "The law of estoppel," said Taunton, J., "is not so unjust or absurd as it has been too much the custom to represent. The principle is, that where a man has entered into a solemn engagement by deed under

Estoppel by deed.

Recitals binding.

Bowman v. Taylor,

Estoppel by deed.

his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted. The question here is, whether there is a matter so asserted by the defendant under his hand and seal that he shall not be permitted to deny it in pleading. It is said that the allegation in the deed is made by way of recital, but I do not see that a statement such as this is the less positive, because it is introduced by a 'whereas.'"

Lainson v. Tremere.

To the same effect as *Bowman v. Taylor*, is *Lainson v. Tremere*, 1 A. & E. 792. That was an action on a bond, the condition of which, being set out on oyer, recited an indenture of demise at a rent of 170*l.*, for payment of which the bond was conditioned. The plea set out an indenture, which it averred to be the same as that mentioned in the condition, and in which the rent was 140*l.*, due payment of which was averred. Replication, non-payment of the 170*l.* rent; and demurrer. The court held that the defendant was estopped from saying that the rent reserved was different from that recited. (See *Harding v. Ambler*, 3 M. & W. 279.) To the same effect as *Bowman v. Taylor*, and *Lainson v. Tremere*, is *Hill v. Manchester Waterworks Co.*, 2 B. & Ad. 544; and so is *Horton v. Westminster Commissioners*, 7 Exch. 780. In the above cases of *Lainson v. Tremere*, *Hill v. Manchester Waterworks Co.*, and *Bowman v. Taylor*, the prior authorities will be found collected.

Other cases.

Effect of mistake in equity.

In equity, however, a mis-statement of the amount of the debt, which occurred throughout a mortgage deed, but which was shown by subsequent deeds between the parties to be a mere mistake, was treated as of no importance; *Scholefield v. Lockwood*, 33 L. J. Ch. 106.

In *Brooke v. Haynes*, 6 Eq. 25, 30, Lord Romilly said: "Although an executor may execute a solemn deed, saying, 'I have paid all the legacy duty on certain bequests,' amounting to a sum named, still if he shows clearly that there is a mistake in the amount, and there is no fraud or deception in the case, I am of opinion that he is in equity entitled to recover any further sum which he may have been properly called upon to pay."

Empson's Case.

In *Empson's Case*, 9 Eq. 597, a person who mortgaged property to a building society, by a deed which recited by mistake that he was a member of the society, was held by Malins, V.-C., not to be estopped in equity from showing that he had executed the deed without reading it, and was, in fact, not a member, and therefore not liable as a contri-

butory on the society's winding-up. See also *Ex p. Morgan*, 2 Ch. D. 72, 89, *per* Mellish, L.J. In *General Finance Co. v. Liberator Society*, 10 Ch. D. 15, Jessel, M.R., expressed an opinion that the doctrine of estoppel by deed "should not be carried further than a judge is obliged to carry it."

Estoppel by deed.

These cases are of the more importance on account of the provision of the Judicature Act, 1873, that where there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

Jud. Act, 1873
s. 25, subs. 11.

A distinction has been frequently noticed between the effect of a *general* and a *particular* recital. Lord Denman, in delivering the judgment in *Lainson v. Tremere*, *supra*, said: "In 1 Rolle's Abr. *Estoppel*, (P.) pl. 1 & 7, it is said that 'if the condition contains a *generality* to be done, the party shall not be estopped to say there was not any such thing; but in all cases where the condition of a bond has reference to any *particular thing*, the obligor shall be estopped to say that there is no such thing.' The same rule as to generalities and particularities is laid down in *Strowd v. Willis*, Cro. Eliz. 362, and *Shelley v. Wright*, Willes, 9, and urged in argument in *Hosier v. Searle*, 2 B. & P. 299, and *Hill v. Manchester Waterworks Co.*"

Distinction between general and particular recitals.

The grounds of this distinction I apprehend to be the same as has already been laid down with reference to estoppels by matter of record, namely, that an *estoppel* must be *certain*. (See *ante*, p. 731.) In *Right v. Bucknell*, 2 B. & Ad. 278, where a party had covenanted with a mortgagee that he was "legally or equitably" entitled, a subsequent mortgagee was held not to be estopped from setting up the legal estate, which the mortgagor had acquired after the first mortgage. "There is," said Lord Tenterden, delivering the judgment, "a want of that *certainity of allegation* which is necessary to make it an estoppel. Lord Holt lays it down in *Salter v. Kidley*, 1 Show. 59, that *general recital* is not an estoppel, *though a recital of a particular fact is*." See Com. Dig. *Estoppel*, A. 2; *Rainsford v. Smith*, Dyer, 196 a. The same rule was acted upon in *Kepp v. Wiggett*, 10 C. B. 35, where the sureties in a bond were considered not to be bound by a recital that the principal had been duly appointed; and in *Heath v. Crealock*, 10 Ch. 22, where it was held that a recital that S. "was seised or otherwise well and sufficiently entitled to" certain property "free from incumbrances" was not so precise or unambiguous as

Grounds of distinction: that estoppel must be certain.

Estoppel by
deed.

to create an estoppel as to the fact of S. possessing the legal estate. It was also acted upon by Jessel, M.R., in *General Finance Co. v. Liberator Society*, 10 Ch. D. 15; and by the C. A. in *Onward Building Society v. Smithson*, (1893) 1 Ch. 1.

Intention of
deed must be
looked to.

It is always a question of construction whether the recital is to be considered as the language of both parties agreeing upon a fact, or the assertion of one of them only, and the estoppel is limited in this respect by the construction of the instrument; *Stroughill v. Buck*, 14 Q. B. 781; and *Heath v. Crealock*, 10 Ch. 22. And when a deed is set up as an estoppel, the real intention and object of the admissions in it must be looked to; *S. E. R. Co. v. Warton*, 6 H. & N. 520.

Morton v.
Woods.

A case illustrative of the rule is *Morton v. Woods*, L. R. 4 Q. B. 293. There the plaintiff sued the defendants for wrongful distress. They had distrained under the provisions of a mortgage deed, executed by the plaintiff, but not by themselves, whereby the plaintiff in consideration of their advances, purported to convey to them certain property upon trust for sale, and, as further security for the advances, attorned tenant to them for a term of years at a rent, with a proviso for their entering and determining the term. This deed, however, recited a previous mortgage of the property by the plaintiff, so that on the face of the instrument creating the supposed estoppel it appeared that there was no legal estate in the plaintiff to convey to the defendants; and the plaintiff therefore contended that there was no legal estate in the defendants to support the distress, for that, the truth appearing, the estoppel created by the supposed tenancy ceased. But the Exch. Cham. held otherwise, upholding the judgment of the Q. B. In giving judgment, Kelly, C.B., cited with approval the opinion of Lord Chelmsford in *Jolly v. Arbuthnot*, 4 De G. & J. 237, that "the circumstance of the truth of the case appearing upon the deed is a reason why the agreement of the parties which it embodies should be carried out, either by giving effect to their intentions in the manner which they have prescribed, or by way of estoppel to prevent their denying the right to do the acts which they have authorised to be done."

Jolly v.
Arbuthnot.

No estoppel as to the legal estate is created by the common words of *grant* in a conveyance, nor, it seems, by a covenant for title; see *per* Jessel, M.R., *General Finance Co. v. Liberator Society*, 10 Ch. D. 15, 23; and *per* Lindley, L.J., *Onward Building Soc. v. Smithson*, (1893) 1 Ch. 1, 13.

It may also be noticed that a recital in a deed, while it may operate as an estoppel not only in an action of covenant upon the deed itself but also in any proceeding to enforce the rights arising out of the deed (*Wiles v. Woodward*, 5 Exch. 557), does not, as it seems, estop the parties in an action not founded on the deed but wholly collateral thereto; see *Carpenter v. Buller*, 8 M. & W. 209, 212, cited by Mellish, L.J., in *Ex p. Morgan*, 2 Ch. D. 72, 89. In *Fraser v. Pendlebury*, 31 L. J. C. P. 1, a mortgagee, who had agreed to assign his security upon payment of principal, interest, and costs, refused to execute the assignment until an excessive sum for costs had been paid by the assignee under the direction of the mortgagor; the assignment, which was executed by the mortgagor, recited that the full amount paid was due for principal, interest, and costs. In an action by the mortgagor to recover the excess from the mortgagee, it was held that the mortgagor was not estopped from showing that part of the sum for costs was improperly claimed. "The matter now in dispute in this action," said Williams, J., "is entirely collateral to the deed of assignment." "The main purpose of the deed," said Erle, C.J., "was a transfer of the mortgage security, and not the settlement of the amount of the costs." See also *S. E. R. Co. v. Warton*, 6 H. & N. 520; and *per Wood, V.-C., Carter v. Carter*, 3 K. & J. 645. This is analogous to the rule already stated as to judgments (*ante*, p. 759).

Estoppel by deed.

No estoppel where action wholly collateral.

Fraser v. Pendlebury.

With regard to the mode in which an estoppel by deed is to be used, it is apprehended that the rule is the same as that which, as is contended above (p. 750), governs the user of an estoppel by the judgment of a court of record, viz., that the estoppel must be pleaded if there be an opportunity; otherwise, the party omitting to plead it waives the estoppel, and the jury must find the truth; see *Bowman v. Rostron*, 2 A. & E. 295; *Wilson v. Butler*, 4 B. N. C. 748; *Carpenter v. Buller*, 8 M. & W. 212; *Freeman v. Cooke*, 2 Exch. 654; *Young v. Raincock*, 7 C. B. 310. It is, however, clear that, where the estoppel was apparent on the face of the record, advantage of it might formerly have been taken on demurrer. This, it will be seen, was done in *Bowman v. Taylor*, and *Hill v. Manchester Waterworks Co.*, *supra*; *Beckett v. Bradley*, 7 M. & Gr. 994; and *Hills v. Laming*, 9 Exch. 256; and a number of instances will be found in the instructive notes to *Veale v. Warner*, 7 Wms. Saund. 325 a, where the authorities on this point are collected.

Pleading.

Estoppel by deed.

No estoppel where interest passes.

Expiration of lessor's title.

Assignee of reversion by estoppel may rely on estoppel against lessee.
Cuthbertson v. Irving.

This seems the best place in which to advert to a rule which, although general, is most frequently applied to cases of estoppel by deed, viz., *that there can be no estoppel where an interest passes*. Thus, though a lessee is estopped from showing that his lessor had no title to the premises demised, (see *Weeks v. Birch*, 69 L. T. 759, where one co-parcener demised the whole of the land), yet he may show that he was entitled to a particular estate which has expired; see *Doe v. Seaton*, 2 C. M. & R. 728; *Neave v. Moss*, 1 Bing. 360; *Langford v. Selmes*, 3 K. & J. 220; and *Weld v. Baxter*, 11 Exch. 816, 1 H. & N. 568; and see the notes to *Walton v. Waterhouse*, 2 Wms. Saund. 826, ed. 1871, in which this portion of the subject is so fully treated by the learned editors that it would be a mere waste of time to recapitulate their observations; see also *post*, p. 810.

The assignee of a reversion by estoppel may rely on the estoppel against the lessee; see *Cuthbertson v. Irving*, 4 H. & N. 742, 6 Id. 135. There a mortgagor in possession, who had no legal title, but only an equity of redemption, granted a lease. He afterwards assigned all his estate and title to the plaintiff, who sued the tenant on a covenant to repair, and it was held in the Exch. Cham., affirming the judgment below, that the tenant was estopped from denying that the lessor had such a legal estate as would warrant the lease. "The lessor in this case," said Wightman, J., delivering the judgment of the Court of Error, "being a mortgagor in possession at the time of the granting of the lease had no legal title to the premises, but only an equity of redemption. His title, therefore, as between him and his lessee is only by estoppel; and if the lessor assign, as he can only assign that which he had, his assignee will either have a title by estoppel as against the lessee, or no title at all. In this case, if the plaintiff had declared in the old form, he would have stated the lessor to have been seised in fee, which according to the cases might have been traversed, and if it had, and it had appeared upon the evidence that the lessor had no legal estate or interest whatever in the premises, but only an equity of redemption, the question is, how ought the issue upon the traverse to be found? The answer is, for the plaintiff; because the lessee is estopped from denying that the plaintiff had such a *legal* estate as would warrant the lease; and, as no other legal estate or interest is shown to have been in the lessor, it must be taken, as against the lessee by estoppel, that the lessor had

an estate in fee. It may be difficult to reconcile all the cases upon the point, but they are all discussed in the notes to *Spencer's Case*, (*ante*, vol. i., p. 52) and in the judgment in this case, delivered by my brother Martin in the Court below; and the result appears to be that there is no sound reason why the assignee of the reversion should not establish his title by way of estoppel." As to the liability of the lessor by estoppel, see *Hartup v. Bell*, C. & E. 19.

Estoppel by deed.

On the doctrine of the principal case of *Doe v. Oliver*, that the interest when it accrues feeds the estoppel, see *Heath v. Crealock*, 18 Eq. 215, where it was held that the estoppel was not fed by an interest which accrued by means of a conveyance cancelled by a Court of Equity on the ground of fraud. On appeal it was held that there was no estoppel, 10 Ch. 22.

When interest feeds estoppel.

It is scarcely necessary to add with regard to an estoppel by deed, that it extends to persons claiming under the person estopped, in the same manner as an estoppel by record does; see *Taylor v. Needham*, 2 Taunt. 278; *Doe v. Stone*, 3 C. B. 176, where the purchaser of an equity of redemption was held bound by a recital in the mortgage deed; and *Clemow v. Geach*, 6 Ch. 147. See also *ante*, vol. i., pp. 91 *et seq.*

Estoppel by deed extends to persons claiming under person estopped.

The following point is, however, worth notice. No person can void his own deed by which an estate has passed, on the ground of his own fraud in executing it; *Doe v. Roberts*, 2 B. & Ald. 367. But it sometimes happens that a party claiming through him can, for that party may be one of those who would be aggrieved by the fraud; *Doe v. Lloyd*, 5 B. N. C. 741. See also *ante*, vol. i., p. 389.

Person claiming through a grantor may sometimes set up grantor's fraud.

An estoppel cannot operate to prevent either party from objecting to an instrument that it is not properly stamped; see *Stedman v. Duhamel*, 1 C. B. 888; and 54 & 55 Vict. c. 39, s. 117; or that it requires enrolment under some statute; *Doe v. Ford*, 3 A. & E. 649; or upon other like grounds which are allowed for the benefit of the public. See *Collins v. Blantern*, vol. i., p. 355, and the notes. And see a supposed but not real exception where the law does not invalidate the instrument altogether, but only prevents it from having a particular operation; *Phillpotts v. Phillpotts*, 10 C. B. 85.

Estoppel does not prevent objection on public grounds.

The liquidator of a company is not estopped by statements in a registered contract from showing that shares issued as fully paid were not paid for at all, it being *ultra vires* to issue shares as fully paid as a gift; *Re Eddystone Co.*, (1893) 3 Ch. 9.

Estoppel in
pais.

Estoppel by Matter in Pais.

The instances given by Lord Coke (Co. Litt. 352 a) of estoppels *in pais* are :—" By matter *in pais*, as by liverie, by entry, by acceptance of rent, by partition, and by acceptance of an estate," as in the case put by Littleton, ss. 666, 667.

Estoppel in
pais need not
formerly have
been pleaded.

There is a remarkable distinction between this and the other kinds of estoppel, namely, that under the old system of pleading it might have been relied on in evidence as conclusive without being pleaded specially by way of estoppel. But it appears from *Darlington v. Pritchard*, 4 M. & Gr. 783 (where an estoppel arising out of the acceptance of rent was replied to a plea alleging an adverse title), and *Sanderson v. Collman*, Id. 209 (where the estoppel arising out of the acceptance of a bill of exchange was replied to a plea denying the drawing), that it was optional either to plead specifically the facts out of which the estoppel arises, or to allege or deny, as the case might be, that which those facts concluded the opposite party from denying or alleging, and rely at the trial upon the matter *in pais* which created the estoppel, as being conclusive evidence of such allegation or denial. It is apprehended that under the system established by the Judicature Acts it is necessary to set forth the facts which create the estoppel.

Tenant
estopped from
disputing
landlord's
title.

The example given by Littleton of an estoppel by acceptance of an estate is the case of a feoffment without writing accompanying it; a case which could not arise at present, in consequence of the Statute of Frauds. We have, however, numerous instances of this sort of estoppel; for no rule can be more clearly settled than that a man shall not be permitted, during his possession of premises, to dispute the title of the landlord under whom he entered. The case most often cited for this is perhaps *Doe v. Smythe*, 4 M. & S. 347. "It has," said Dampier, J., in that case, "been ruled often, that neither the tenant, nor any one claiming by him, can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord. This, I believe, has been the rule for the last twenty-five years, and, I remember, was so laid down by Buller, J., upon the western circuit." Accordingly in *Doe v. Mills*, 2 A. & E. 17, it was held that, if a tenant consents to give up possession to a party claiming by a title adverse to his own landlord, that party is estopped, as the tenant would have been, from disputing the landlord's title. So a

Person taking
from tenant.

person who defends in ejectment as landlord is bound by an estoppel of this sort existing against the tenant in possession; *Doe v. Smythe*, *supra*; see also *Doe v. Mizem*, 2 M. & Rob. 56; *Ford v. Ager* 2 H. & C. 279; and *L. & N. W. R. Co. v. West*, L. R. 2 C. P. 553, a case of a sub-tenant.

Estoppel *in pais*.
Landlord and tenant.

A great number of instances of this sort will be found collected in the note to *Veale v. Warner*, 1 Wms. Saund. 325; in addition to which, see *Doe v. Fuller*, 1 Tyr. & Gr. 17; *Parry v. House*, Holt, N. P. 489; *Hall v. Butler*, 10 A. & E. 204; *Dolby v. Iles*, 11 Id. 335; *Doe v. Wiggins*, 4 Q. B. 367; *Doe v. Foster*, 3 C. B. 215; *A.-G. v. Hotham*, 3 Russ. 415; and *Fleming v. Gooding*, 10 Bing. 549, where it is laid down that, where premises are let by the agent of an unnamed landlord, as such, the tenant who has gone into possession is estopped from disputing the title of the unnamed landlord when disclosed. See also *Francis v. Doe*, 4 M. & W. 331, where a firm taking a lease from one of the partners, was held to be estopped; and *Gibbins v. Buckland*, 1 H. & C. 736.

Instances.

Unnamed landlord.

The principle of the rule includes even a licensee, who is prevented from disputing the title of the person who licensed him; *Doe v. Baytup*, 3 A. & E. 188. In that case, the defendant asked leave of the party possessed to get vegetables in the garden, and, having thus obtained an entrance, took possession of the house, claiming a title. It was held that she was estopped. "In the case," said Patteson, J., "of a person who has become tenant, there is no doubt as to the law. *Doe v. Smythe* shows that he must first give up possession to the party by whom he was let in, and then, if he, or any one claiming by him, has a title *aliunde*, that title may be tried by ejectment. . . . The rule, as to claiming title, which applies to the case of a tenant, extends also to that of a person coming in by permission, as a mere lodger, or as a servant." But see *Tadman v. Henman*, *post*, p. 811.

Licensee estopped.

See likewise *Doe v. Skirrow*, 7 A. & E. 157; *Doe v. Birchmore*, 9 Id. 662; *Duke v. Ashby*, 7 H. & N. 600; and *Cowper v. Fletcher*, 6 B. & S. 464, where it was held that one of two joint tenants may demise his part to the other with the usual incidents of a reversion and right to distrain; and it seems that the joint tenant who has taken possession, and paid rent, is estopped from saying that he is not tenant to the other.

Demise to joint tenant.

A person who has been let into possession under a void

Possession under void lease.

Estoppel *in pais*.
Landlord and tenant.

Possession under devisee.

Tenant may show in reduction of damages that landlord's fixtures given up to mortgagee.

Tenant may show expiry of landlord's title.

Estoppel on landlord.

Expiration after action brought.

lease and has not paid rent or otherwise acknowledged that he held as tenant, is not estopped from saying that he did not hold as tenant, and had acquired a title under the Statute of Limitations; *Magdalen Hospital v. Knotts*, 4 App. Cas. 324.

By analogy to the estoppel between landlord and tenant, one who had been let into possession by a devisee was held estopped from disputing the validity of the will as against a remainderman who claimed under it to enter on the devisee's death; *Board v. Board*, L. R. 9 Q. B. 48; see *Paine v. Jones*, 18 Eq. 320. See this subject discussed in *Re Stringer*, 6 Ch. D. 1.

However, a tenant who has covenanted with his landlord to give up fixtures at the end of the term, is not estopped from showing, in reduction of damages, that they were claimed by and given up to a mortgagee deducing title from the landlord; *Watson v. Lane*, 11 Exch. 769.

Though the tenant cannot dispute the landlord's title, he is permitted to show that it has expired (see the authorities collected in the notes to *Walton v. Waterhouse*, 2 Wms. Saund. 418); for, in that case, he does not *dispute* the title, but confesses and avoids it by matter *ex post facto*. Thus in *Hopcraft v. Keys*, 9 Bing. 613, Hopcraft was let into possession by Hawkins at a quarterly rent for a year certain; but Hawkins's own title was under Kent, and was defeasible upon the non-completion of certain buildings; and, these not having been completed, Kent re-entered before any rent became payable from Hopcraft to Hawkins, and kept out Hopcraft for some weeks, but afterwards restored him to possession under a new agreement, and at a different rent payable to himself; Hawkins afterwards distrained for the rent he had reserved, and in an action of replevin it was held that Hopcraft was not estopped from showing, under a plea of *non tenuit*, that his landlord had a defeasible title only, and that it had been defeated. See *Doe v. Seaton*, 2 C. M. & R. 728; *Doe v. Barton*, 11 A. & E. 307; *Mayor of Poole v. Whitt*, 15 M. & W. 571; *Delaney v. Fox*, 2 C. B. N. S. 768; and *ante*, p. 806. In *Downs v. Cooper*, 2 Q. B. 256, Lord Denman said that "if a tenant is estopped from denying the title of the landlord who gives him possession, the landlord must also be estopped from treating as his tenant him whom he has required to enter into that relation with another instead of himself."

If, however, the title of the lessor expires *after* an action of ejectment has been commenced, but *before trial*, the

lessee is estopped from setting that up as a bar to the issue of a writ of possession, unless he proves that it would be unjust or futile to issue such writ; *Knight v. Clarke*, 15 Q. B. D. 294.

Estoppel *in pais*.
Landlord and tenant.

As it is competent to the tenant to show when the title of the landlord expired, so he may dispute its validity at any time previous to his own tenancy, so as to avoid an assurance made by the landlord before its commencement; *Doe v. Powell*, 1 A. & E. 531.

When tenant may dispute landlord's title previous to his tenancy.

And "when the lease is at an end, the man who was formerly the tenant, but has now ceased to be so, may show that it was altogether a mistake to have taken that lease, and that the land really belonged to him; but during the continuance of the lease he cannot show anything of the sort: it must be taken as against him that the lessor had a title to the land;" *per* Lord Blackburn, *Clark v. Adie*, 2 App. Cas. 423, 435.

After expiry of lease estoppel ceases.

In *Watson v. Lane*, 11 Exch. 772, it was suggested by Pollock, C.B., referring to *Ogle v. Atkinson*, 5 Taunt. 759, that it is only in ejectment that a tenant is estopped from denying his landlord's title; but the Court of C. P. was of opinion, in *Delaney v. Fox*, *supra*, that this is not so. In *Cook v. Whellock*, 24 Q. B. D. 658, the C. A. held that, in an action for rent, a tenant cannot set up that his landlord, when he let him into possession, was an undischarged bankrupt and therefore had no title to demise.

Doctrine of estoppel not confined to ejectment.

It was held by Charles, J., in *Tadman v. Henman*, (1893) 2 Q. B. 168, that the landlord's title to demise may be disputed by a stranger whose goods, while on the demised premises under the licence of the tenant, have been distrained for arrears of rent. But see *Syllivan v. Stradling*, 2 Wils. 208; *Jolly v. Arbuthnot*, 4 De G. & J. 224; *Cuthbertson v. Irving*, 4 H. & N. 742, 6 Id. 135.

Stranger whose goods are distrained.

As to the rights of the assignee of a reversion by estoppel, see *Cuthbertson v. Irving*, *ante*, p. 806.

Assignee of reversion by estoppel.

The estoppel by payment of rent is not so strong as that by acceptance of the tenancy; for a person who has paid rent is allowed to show that he did so in consequence of mistake or misrepresentation; *Fenner v. Duplock*, 2 Bing. 10; *Rogers v. Pitcher*, 6 Taunt. 202. "The rule is clear," said Dallas, J., in the latter case, "that, generally, a tenant cannot dispute his landlord's title; but here it comes to this question, whether, after a person has been in possession under another lessor, if he is persuaded to attorn under

As to payment of rent, mistake may be shown.

Estoppel *in pais*.
Landlord and
tenant.

circumstances which do not warrant it, it may not be open to him to prove that the rent was paid without sufficient ground; and I think it is." In *Doe v. Francis*, 2 M. & Rob. 57, the lessor of the plaintiff proved payment of rent—the defendant proposed to put in an answer in Chancery, in which he had sworn that he had no real interest in the premises, but had acted as agent for a body of adventurers. It was objected that the defendant was estopped from disputing the title of a person to whom he had paid rent. The objection, however, was overruled by Patteson, J., who said that, "where a tenancy was attempted to be established by mere evidence of payment of rent, without any proof of an actual demise, or of the tenant's having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent, and to show on whose behalf such rent was received."

Even when
paid under
distress.

In *Knight v. Cox*, 18 C. B. 645, payment of rent even under a distress was held not to be a conclusive admission of title in the distrainor, but rebuttable by showing that he never had any title.

Circumstances
of attornment
explained.

See also *Brook v. Biggs*, 2 B. N. C. 572; *Hall v. Butler*, 10 A. & E. 204, *per* Patteson, J.; *Claridge v. MacKenzie*, 4 M. & Gr. 143. In *Doe v. Brown*, 7 A. & E. 447, it was held that a tenant who had attorned to the vendee of the landlord was not estopped from showing that the landlord had, before the sale, without his knowledge, become bankrupt. On the same principle, in *Doe v. Barton*, 11 Id. 307, a tenant who was let in by the mortgagor, and who had paid rent to a second mortgagee, was allowed to set up the first mortgage on receiving notice of it. In *Carlton v. Bowcock*, 51 L. T. 659, Cave, J., laid down that "where a person claiming to be assignee of the reversion obtains payment of rent from the tenant by fraud or misrepresentation, such payment is no evidence of title; but receipt of the rent is *primâ facie* evidence of title where there is no such fraud or misrepresentation."

Apart from
special reason,
tenant con-
cluded by
payment of
rent.

However, if the tenant cannot show some special reason to the contrary, he will be concluded by *payment of rent*. In *Cooper v. Blandy*, 1 B. N. C. 45, two persons, under whom the plaintiff in replevin claimed, had paid rent to the defendant. "Whether or not," said Tindal, C.J., "such a payment, is, in all cases, and, at all events, an estoppel, which precludes the occupier from showing that some other

person is entitled, we need not decide here. In *Rogers v. Pitcher* (supra, p. 811), "it was held that, under some circumstances, it may not be an estoppel. But it is not pretended here that any other person is entitled to the rent; and after two successive tenants, under whom the plaintiff comes into possession, have admitted the defendant's title, we are called upon to say he has none. Before calling on us to come to any such conclusion, the plaintiff should, at least, show that he paid the rent to the defendant by mistake, and that some other person is entitled to receive it" (*Accord. Doe v. Wiggins*, 4 Q. B. 367). Bosanquet, J., in his judgment, cited the expressions of Bayley, J., in *Panton v. Jones*, 3 Camp. 372:—"I have no doubt that submitting to a distress acknowledges the tenancy. The landlord after distraining cannot bring an ejectment; and the occupier, if he does not replevy, is, I think, precluded from denying the title of the landlord." See also *Doe v. Plomer*, 9 Bing. 41; *Carlton v. Bowcock*, supra. In *Williams v. Heales*, L. R. 9 C. P. 177, the defendant, who, after the death of the original lessee and his administratrix, let the premises, received the rent, and paid the ground rent, was held estopped from denying that he was assignee of the term.

Estoppel in pais.
Landlord and tenant.

In *Doe v. Budden*, 5 B. & Ald. 626, the court seem to have intimated in their judgment that the person, whose title the tenant seeks to set up, must not be one whose name the landlord would be entitled to use in an ejectment.

Estoppel by *admittance* is mentioned by Lord Coke, Co. Litt. 352 a, as one species of estoppel by matter of record. The roll of a manor is perhaps, however, scarcely to be called a record; and in *Doe v. Budden*, 5 B. & Ald. 626, the objection to a tenant's disputing the title of the lord who admitted him seems to be rested by the court rather upon the ordinary principle by which a tenant is precluded from disputing his landlord's title.

Estoppel by admittance.

To the same class of estoppels *in pais* by entry, acceptance of an estate, and the like, may be referred those cases in which a tenant, by accepting a lease for a new term, even less than the existing one, is held impliedly to surrender it (provided always that such an estate pass by the new lease as appears thereby to have been contemplated by the parties at the time, that being an implied condition of such a surrender; *Roe v. Archbp. of York*, 6 East, 86; *Doe v. Poole*, 11 Q. B. 713). As, if a lessee for thirty years takes a new lease, though but for three years, and to begin ten years

Implied surrender by acceptance of new lease; if contemplated estate passes.

Estoppel in
pais.

Surrender by
operation of
law.

By cesser of
tenancy and
re-entry by
landlord.

hence, yet this is presently a surrender and determination of the whole first term of thirty years; Bac. Abr., *Leases* (S) 2.

Apparently for the same reason, an agreement between the landlord and a tenant that the tenancy should cease, and the landlord re-enter, acted upon by the tenant's quitting, and the landlord's re-entry accordingly, has been held to work a surrender by operation of law; *Grimman v. Legge*, 8 B. & C. 324; *Dodd v. Acklom*, 7 Scott, N. R. 415; yet see *Morrison v. Chadwick*, 7 C. B. 266; but not without a change of possession; *Mollett v. Brayne*, 2 Camp. 103; *Doe v. Johnston*, M'Clel. & Y. 141; *Johnstone v. Hudlestone*, 4 B. & C. 922; although even then the agreement might operate as a defence to an action for rent; *Gore v. Wright*, 8 A. & E. 118. See also as to these points, and as to the effect of a substitution of a new tenant for the old one, *Walker v. Godé*, 6 H. & N. 594; *Phené v. Popplewell*, 12 C. B. N. S. 334; *Cadle v. Moody*, 30 L. J. Ex. 385; and *Oastler v. Henderson*, 2 Q. B. D. 575. See also *Moss v. James*, 37 L. T. 715, 38 Id. 595.

By new demise
to person
already put in
possession by
lessee.

Thomas v.
Cook.

The doctrine involved in the cases above referred to was, in *Thomas v. Cook*, 2 Stark. 408, 2 B. & Ald. 119, applied (it is believed for the first time, unless the previous case of *Stone v. Whiting*, 2 Stark. 235, be considered in the light of a decision) to a case where a new demise was made by the reversioner with the assent of the lessee to a third person whom the lessee had previously put in possession.

Thomas v.
Cook followed.

The same doctrine was unhesitatingly acted upon by the Court of Exch. in *Bees v. Williams*, 2 C. M. & R. 581, where *Thomas v. Cook* does not appear to have been cited; and again (not without doubts, by treating *Thomas v. Cook* as having settled the point) in *Walker v. Richardson*, 2 M. & W. 882, where the demise was of tolls. *Thomas v. Cook* was also referred to without disapprobation by Parke, B., in *Turner v. Hardey*, 9 M. & W. 770; and by the Court of Exch. in Ireland, in *Lynch v. Lynch*, 6 Ir. L. R. 131, where the original lease was *freehold*. In the latter case a passage from Shep. Touch. p. 301, was cited to show that a new lease to the tenant and a stranger has the effect of a surrender by operation of law, equally with a new lease to the tenant alone; and it was said that *Thomas v. Cook*, where the new demise was with the assent of the lessee to a stranger, did not go much further. Pennefather, B., observed, in his judgment, that doubts had been entertained

of the soundness of the decision in *Thomas v. Cook*, in which doubts he himself had participated; but he said that, acted upon as that case had been, it could not be controverted except in a court of error. The other judges expressed their opinion that it had been correctly decided. All agreed that it was a binding authority upon a motion for a new trial, and that it applied equally to the case of a freehold as of a chattel interest, between which, they said, no sound distinction could be suggested in this respect, referring to *Mellow's Case*, Moore, 636, case 829.

Estoppel *in pais*.
Surrender by operation of law.

In later cases, however, the propriety of those decisions has been the subject of discussion. They appear to have been for the first time distinctly called in question in the profoundly elaborate judgment of the Court of Exch. in *Lyon v. Reed*, 13 M. & W. 285.

Thomas v. Cook, &c., questioned.

Assuming the view of the facts stated in the judgment to have been that adjudicated upon (although a somewhat different colour is given them, so far as the assent of the termor is concerned, in the judgment of the Court of Q. B. in *Nickells v. Atherstone*, *infra*), the point decided in *Lyon v. Reed* appears to have been, that the delivery up of his lease by one who had a term of years in a reversion, with an assent on his part to the making of a new lease (by the owner of the reversion expectant on his term) to a third person, and the making of that lease accordingly, did not work a surrender by operation of law: because the acts of delivering up the lease, and assent to the making of a new lease to a third person, were held not to belong to that class of acts *in pais* (mentioned *ante*, p. 808), which bind parties by way of estoppel, and "which anciently really were, and in contemplation of law have always continued to be, acts of notoriety not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like."

Lyon v. Reed.

The term "surrender by operation of law" was said, by Parke, B., in delivering the judgment, to be properly applied to cases where some act has been "done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says that the act itself amounts to a surrender. In such case, it will be observed that there can be no question of *intention*. The surrender is not the result of intention. It takes place independently, and even in spite of intention."

Estoppel *in pais*.

Surrender by operation of law.

And in a subsequent part of the judgment, after referring to the enumeration of the acts of notoriety in Co. Litt. 352, (see *ante*, p. 808), his lordship said: "Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. But in what uncertainty and peril will titles be placed if they are liable to be affected by such accidents as those alluded to by Bayley, J." That part of the judgment of Bayley, J., in *Thomas v. Cook*, is here alluded to, where that learned judge said that the jury were right in finding that the original tenant assented, *because*, he said, it was clearly for his benefit. Parke, B., proceeded to say: "If the doctrine of *Thomas v. Cook* should be extended, it may very much affect titles to long terms of years, mortgage terms for instance, in which it frequently happens that there is a consent expressed or implied by the legal termor to a demise from a mortgagor to a third person. To hold that such a transaction could, under any circumstances, amount to a surrender by operation of law, would be attended with most serious consequences. The case of *Thomas v. Cook* has been followed by others, and acted upon to a considerable extent. Whatever doubt, therefore, we might feel as to the propriety of the decision that in such a case there was a surrender by act and operation of law, we should probably not have felt ourselves justified in overruling it. And perhaps the case itself, and others of the same description, might be supported upon the ground of the actual occupation by the landlord's new tenants, which would have the effect of eviction by the landlord himself in superseding" (*quære* suspending) "the rent or compensation for use and occupation during the continuance of that occupation. But we feel fully warranted in not extending the doctrine of that case, which is open to so much doubt, especially as such a course might be attended with very mischievous consequences to the security of titles. If, in compliance with these cases, we hold that there is a surrender by act and operation of law where the estates dealt with are corporeal and in possession, and of which demises may therefore be made by parol, or writing, and where there is an open and notorious shifting of the actual possession, it does not follow that we should adopt the same doctrine where reversions or incorporeal hereditaments are disposed of, which pass only by deed. With respect to these, we think we ought to abide

by the ancient rules of the common law, which have not been broken in upon by any modern decision: for that of *Walker v. Richardson*, 2 M. & W. 882, which has been much relied on in argument, is not to be considered as any authority in this respect, inasmuch as the distinction that the right to tolls lay in grant was never urged, and probably could not have been with success, as the leases, perhaps, passed the interest in the soil itself."

The reasoning of the Court of Exch. in *Lyon v. Reed* has been since entirely concurred in by the Lord Chancellor of Ireland (Lord St. Leonards) in *Creagh v. Blood*, 3 Jo. & Lat. 133 (2 Dec. 1845); but disapproved of by the Court of Q. B., in *Nickells v. Atherstone*, 10 Q. B. 944.

In *Creagh v. Blood*, the term which was alleged to have been surrendered by operation of law was a freehold, as in *Lynch v. Lynch*, *supra*. Sugden, L.C., in his judgment, speaking of the latter case, said: "The point came upon me by surprise, and, until I heard of the decision, I was not aware of any such rule: and, speaking with great deference, I think it will turn out that there is not such a rule of law. Before I would act on it, I should require the question to undergo further consideration; for an estate of freehold cannot, since the Statute of Frauds, be created or transferred without writing, and, where the statute speaks of surrender by operation of law, it certainly alludes to those surrenders where the party, whether by estoppel or otherwise, accepts an estate inconsistent with the estate he has. If I am in possession under a freehold lease, it is not by standing by while the lessor with my knowledge grants the lands to another person, as if he were entitled to them in possession, that my estate is to be divested. I may, in consequence of my conduct, be compelled by a court of equity to transfer my estate; but not being a party to the deed, and not having transferred my estate or parted with the possession, I confess it appears to me that such conduct cannot amount to a surrender by operation of law of the estate so vested in me."

His lordship proceeded to direct a case to be sent to a court of law, but, in consequence of the difficulty of framing a case, the question between the parties was afterwards decided without the opinion of a court of law being taken, and the Chancellor, in the course of his final judgment, said: "*Thomas v. Cook* established a new doctrine, but it proceeded upon the act of the former tenant, who had placed

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Surrender by operation of law.

Lyon v. Reed, approved in *Creagh v. Blood*; disapproved in *Nickells v. Atherstone*.

Creagh v. Blood.

Estoppel in
pais.
Surrender by
operation of
law.

another in possession, and agreed to the latter becoming immediate tenant to the landlord; and it is so explained in *Johnstone v. Hudlestone*, 4 B. & C. 933, by Bayley, J., who joined in the decision in *Thomas v. Cook*. But I entirely concur in the reasons given by Parke, B., in delivering the judgment of the court in *Lyon v. Reed*. If *Thomas v. Cook* is not to be overruled, the doctrine should not be carried further. *Lynch v. Lynch* was relied upon as an authority that the doctrine equally applies to a freehold interest like that in this case, and no doubt the point was so decided. But, with all my respect for the judges who decided that case, I cannot follow it—I never so understood the law; and the authorities quoted in the judgment in *Lyon v. Reed* would seem to establish the contrary to be the law. I think the new rule would have a more extensive operation than at first sight would appear. Upon this point, if I were compelled to decide, I should be of opinion that the freehold interest could not be held to be surrendered, by operation of law, on the ground of an acquiescence in the new lease.” It did not, however, become necessary to decide that point.

Nickells v.
Atherstone.

In *Nickells v. Atherstone*, 10 Q. B. 944, the Court of Q. B. do not appear to have had before them the opinion expressed by Sir Edward Sugden. In that case the tenant, during the term (which, being for three years to commence from a day after the demise, required to be, and had been, created by a writing within the Statute of Frauds), quitted the premises, and wrote to the landlord, stating his inability to pay the rent, and that he trusted the rooms might be let by the landlord to some other person, and on better terms. The landlord accordingly did let the rooms to another tenant, who entered and paid rent for some time; but, upon his insolvency, arrears falling due, the landlord turned round upon the former tenant, and sued him in debt on the demise; to which he pleaded surrender and eviction. Wightman, J., who tried the cause, left it to the jury to say, whether the plaintiff did agree to the terms proposed by the defendant, and accept the new tenant as his tenant in lieu and substitution of the defendant, which the jury found in the affirmative; whereupon the learned judge directed the verdict to be entered for the defendant on the pleas of surrender and eviction, reserving leave to move to enter a verdict for the plaintiff upon either or both of these issues. A rule was obtained accordingly; and after argument and consideration the ruling of Wightman, J., was upheld.

That case is, therefore, an additional authority for saying that, where a tenant quits possession of the demised lands, and the landlord, with his consent, lets them to a new tenant, and puts him in possession, with the intention of substituting that new tenant for the former one, the term of his former tenant is surrendered by operation of law.

Estoppel *in pais*.
Surrender by operation of law.

Lord Denman, in delivering the judgment in *Nickells v. Atherstone*, argued that, even assuming the definition of a surrender by operation of law to have been correctly stated in *Lyon v. Reed*, the terms of that definition were satisfied by the facts existing in *Nickells v. Atherstone*. The landlord, he said, was bound, no doubt: so was the new tenant; and, so far as the defendant was concerned, he had been "an active party to the transaction," not merely by consenting to the new letting, but "by giving up possession, and enabling the new tenant to enter;" so that, according to the doctrine of *Pickard v. Sears* (*post*, p. 824), he would be precluded from denying with effect the estate of the new tenant, the result of which was "nearly the same as an estoppel:" That if "an act of notoriety" were required, the notoriety of the transaction was "essentially greater than that which accompanies a parol re-demise between the same landlord and tenant, which is a clear surrender by operation of law:" That this mode of surrender by operation of law had been recognised in each of the superior courts, *Matthews v. Sawell*, 8 Taunt. 270; *Thomas v. Cook*; *Walker v. Richardson*, 2 M. & W. 882; *Bees v. Williams*, 2 C. M. & R. 581; and held valid *at nisi prius* in *Stone v. Whiting*, 2 Stark. 235, and many other cases: That the modern date of the reported decisions might have arisen from there having been "no question on the point in earlier times:" And, indeed, that from *Mollett v. Brayne*, 2 Camp. 103, and *Whitehead v. Clifford*, 5 Taunt. 518, it might be inferred that at least as early as 1809 "a restoration of the possession to the landlord, and a discharge of the tenant by him, was considered a surrender by operation of law:" And that "where there is an agreement to surrender a particular estate, and the possession is changed accordingly, it is more probable that the legislature intended to give effect to an agreement so proved as a surrender by operation of law, than to allow either party to defeat the agreement by alleging the absence of written evidence." His lordship added: "Although we do not assent to the observations upon the cases from *Thomas v. Cook* downwards in the learned and able judg-

Judgment in *Nickells v. Atherstone*.

Estoppel in
pais.

Surrender by
operation of
law.

Discussion of
the question
raised in
Thomas v
Cook.

ment given in *Lyon v. Reed*, we wish to express our entire concurrence in the decision in that case." And, in a subsequent part of the judgment, he said of *Lyon v. Reed*: "There was no change in the possession of the land, no actual change in the possession of the reversion could be made apparent, and the facts stated lead to the conclusion that Ord and Planta (the original termors) did not know of the demise to Osborne and Burt (to whom the new lease was made); but the probability is, that the term in them as trustees had been forgotten at the time when their concurrence was requisite for the new lease." It is obvious, however, that the Court of Exch. did not rely on that view of the facts, because, in the course of the judgment, Parke, B., said: "Even adopting *as we do* the argument of the plaintiff, that the delivery up by Ord and Planta of the lease in question affords *cogent evidence of their having consented to the new lease*, still there is no estoppel in such a case."

It must therefore be admitted that a difference of opinion exists upon this important subject, and that on each side are ranked high authorities: and this difference is rendered the more embarrassing by the difficulty of perceiving how far the previous decisions are involved. For instance, are those cases affected by it, where, by consent of the landlord and tenant, the tenant has quitted and the landlord himself re-entered, as in *Grimman v. Legge*, and *Dodd v. Acklom*? It may seem strange that they should, for, if a new demise by parol even for a day, if accepted, would operate as a surrender of the former tenancy, will the law, it may be asked, for the sake of a formal consistency, drive the parties to that idle ceremony in order to effect their object? If the reasoning in *Lyon v. Reed* be followed out in practice to its full extent, it will hardly stop short of that result; for it is hard to distinguish between the cases where the landlord in his own person enters by agreement with his tenant, and those where a third person authorised by the landlord so enters, as in *Nickells v. Atherstone*. In this respect it may here be observed that *Nickells v. Atherstone* is distinguishable from *Thomas v. Cook*; that, in *Thomas v. Cook*, the third person had been in the first instance let into possession by the tenant apparently without communication with the landlord: whereas, in *Nickells v. Atherstone*, the third person was put in by the landlord, with the consent and by the authority of the tenant. It would seem,

however, according to the view taken in *Lyon v. Reed*, that that circumstance makes no substantial difference between the two cases; for it is there distinctly laid down that *agreement to an act done by the reversioner is not sufficient*, and for that many authorities are cited. There was not, indeed, in *Lyon v. Reed* any express dissent from that class of cases where a surrender had been held to be wrought by the entry of the landlord himself in pursuance of an arrangement between him and the tenant; but, until a satisfactory distinction is pointed out between the entry of the landlord and that of his new tenant, it is conceived that the argument in *Lyon v. Reed* applies to both. Can it be said that the entry of the new tenant is to be viewed as his entry only, and in no sense as that of the landlord? Not consistently with *Doe v. Harlow*, 12 A. & E. 40, where the Court of Q. B., (overruling the *dictum* of Mansfield, C.J., in *Burne v. Richardson*, 4 Taunt. 720), held the landlord liable in trespass for mesne profits by reason of the occupation of his tenant.

Estoppel *in pais*.

Surrender by operation of law.

But again, to put another case, can any distinction be made in this respect between the surrender of a term required to be by a writing under the Statute of Frauds, or a deed under 8 & 9 Vict. c. 106, and a mere tenancy from year to year created by parol? It seems not, so far at least as appears by the decided cases; for they are of later date than the Statute of Frauds, by s. 3 of which all surrenders of terms, no matter how short their duration, and whether created by writing under s. 1, or not, are prohibited, unless by deed or note in writing, "or by act or operation of law." The case of *Lynch v. Lynch*, therefore, though distinguishable by the circumstance that the estate there was freehold, seems to stand on the same foundation as *Thomas v. Cook*. In *Nickells v. Atherstone* also, as we have seen, the lease required to be and was created by writing, and that circumstance seems to have been treated as immaterial. The 8 & 9 Vict. c. 106, s. 3, does not appear to make any alteration in this respect, for it enacts simply that a surrender *in writing* of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, if made after 10th Oct., 1845, shall be void at law unless made by deed; and so leaves the case of a surrender otherwise than in writing untouched.

Lastly, what of estates which by the common law are

Estoppel in
pais.
Surrender by
operation of
law.

required to be transferred by deed, viz., incorporeal hereditaments? to those it seems that the doctrine of *Thomas v. Cook*, cannot be extended. It was so expressly held in *Lyon v. Reed*: and in *Nickells v. Atherstone* the Court of Q. B. seem to have treated it as an ingredient in the sort of surrender there upheld that there should be a change of possession; which, properly speaking, cannot be in the case of an incorporeal hereditament.

The controversy will therefore in future probably be limited to cases of estates in possession, whether freehold or chattel. And it will in the greater number of instances concern the legal estate in the land rather than the liability to the rent; for, in *Nickells v. Atherstone*, the Court of Exch. might, consistently with *Lyon v. Reed*, have decided in favour of the defendant, as the Court of Q. B. did, but upon a different ground, namely, either that of *eviction*, or, if the consent of the tenant were considered to exclude that, then that of an agreement made by the landlord to exonerate the tenant from payment of the rent, in consideration of his giving up possession, and permitting the landlord to let the land to another tenant. See *Gore v. Wright*, 8 A. & E. 118.

Whatever court shall next have to decide the question, may well pause between the conflicting inconvenience of either overruling a series of cases extending in an unbroken line from 1809 to 1844, and since adhered to on consideration by the Court of Q. B., or, by acting upon them, to aid in keeping open so wide a gate as they have made for uncertainty and fraud. If, on the one hand, it be considered hard that a landlord and tenant should not be able to put an end to the lease without a formal instrument, or some unequivocal act of which a court of law can at once predicate that it has wrought a surrender: on the other, it must be admitted to be a highly unsatisfactory state of the law where titles to property may be perilled by inquiries before a jury as to the intention with which equivocal acts have been done. And it may not be altogether immaterial to bear in mind that there is a jurisdiction in equity to which the parties may if necessary resort for the purpose of enforcing their contracts, and compelling a proper conveyance of the legal estate in accordance with them. It is to be hoped that, when next such a question distinctly arises, it may be carried into a court of error, where the whole subject may be freely discussed, and the law placed upon some satisfactory basis of reason or authority, or, if still possible, of both.

In *Davison v. Gent*, 1 H. & N. 744, the Court of Exch. acted upon and approved of the rule laid down in *Thomas v. Cook*; some doubt being, however, expressed by Bramwell, B. In the judgment of Pollock, C.B., the law is thus stated: "It must, therefore, be taken to be established that where a lessee assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law."

Estoppel *in pais*.
Surrender by operation of law.

Davison v. Gent.

In *Wallis v. Hands*, (1893) 2 Ch. 75, Chitty, J., considered that this controversy had been set at rest by the judgment in *Davison v. Gent*, and stated the rule to be, that "there is no surrender by operation of law unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents." In this case, the *dictum* of Stirling, J., in *Baring v. Abingdon*, (1892) 2 Ch. 374, 381, that "it is established by *Davison v. Gent*, and other cases, that the granting of a new lease by a lessor to a stranger, with the assent of the lessee, will operate as a surrender of the old lease," was explained, on the authority of the learned judge himself, as not intended to express any opinion on the point whether a change of possession was necessary. See also *Easton v. Penny*, 67 L. T. 290, where the new lease was voidable.

Wallis v. Hands.

Contrary to the feeling which seems to have pervaded the courts with regard to other classes of estoppel, their inclination appears to have been to extend the list of estoppels *in pais*, especially in mercantile transactions, where men are obliged to trust much to appearances. Instances will be found in the numerous cases which decided what are the facts which drawers, acceptors, and indorsers respectively of bills of exchange are estopped at common law from disputing, but these are omitted here, as the law on the subject is now contained in the Bills of Exchange Act, 1882, ss. 54, 55.

Inclination of the courts to extend estoppels *in pais*, especially in mercantile transactions.
Bills of exchange.

A bailee or agent is precluded from questioning the title of his bailor or principal to the subject-matter of the bailment or agency; unless, indeed, the bailment has been determined by what is equivalent to an eviction by title paramount, in which case, as a rule, the estoppel ceases and the bailee may set up the *jus tertii*. As against his bailor, "a bailee can set up the title of another only if he defends upon the right and title, and with the authority, of that person;" and he must allege and prove that title and authority; *Biddle v. Bond*, 6 B. & S. 225, and *Rogers v.*

Estoppel between bailor and bailee.

Estoppel in
pais.
General rules.

Lambert, 24 Q. B. D. 573, (1891) 1 Q. B. 318, (where the earlier cases on the subject will be found); and he cannot set up the title of another, of whose claim he was aware when he accepted the bailment; *Ex p. Davies*, 19 Ch. D. 86. If the bailee has *attorned* to an innocent purchaser of the goods, he is estopped, as against such purchaser, from denying his title; *Henderson v. Williams*, (1895) 1 Q. B. 521 (see *post*, p. 834).

As a rule, however, where he is not in default, a bailee, on receiving notice of adverse claims, is entitled to interplead, and that is the proper course for him to adopt; *Attenborough v. St. Katharine's Docks*, 3 C. P. D. 450; *Robinson v. Jenkins*, 24 Q. B. D. 275; *Rogers v. Lambert*, (1891) 1 Q. B. 318, 327.

Classification
of estoppels
in *pais*.

The principle underlying the doctrine of estoppel in *pais* is always, it is apprehended, the same, but it is obvious that the application of the principle must vary with the circumstances of each case that comes to be decided. It is proposed to cite passages from the judgments in which the principle and the general rules deducible from it are most clearly enunciated, and then to illustrate them by examples of some of the cases to which they have been applied. It may be added that estoppels of this kind have sometimes been classified as estoppels by statement, by conduct, and by negligence, a classification which, without being very logical or exact, may be useful for reference, and will therefore be adopted here.

General rule
laid down in
Pickard v.
Sears.

The general rule was thus laid down by Lord Denman in *Pickard v. Sears*, 6 A. & E. 469, 474: "The rule of law is clear, that, where one by his words or conduct *wilfully* causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

What is
"wilful" re-
presentation.
Freeman v.
Cooke.

In *Freeman v. Cooke*, 2 Exch. 654, Parke, B., after stating that the above rule "must be considered as established," said: "By the term 'wilfully' in that rule we must understand, if not that the party represents that to be the truth which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself, that a reasonable man would take the representation to be true, and believe that it was meant

that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect; as for instance, a retiring partner, omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised." . . .

"In truth, in most cases to which the doctrine in *Pickard v. Sears* is to be applied, the representation is such as to amount to the contract or licence of the party making it." This exposition of the law was approved of in the H. L. in *McKenzie v. British Linen Co.*, 6 App. Cas. 82, 101, 109; see also *Jorden v. Money*, 5 H. L. C. 185, 214, 255; *Clarke v. Hart*, 6 Id. 633, 656; *Howard v. Hudson*, 2 E. & B. 1, 10; *Miles v. McIlwraith*, 8 App. Cas. 120, 133.

In *Freeman v. Cooke*, the representation relied upon as an estoppel was indeed made *so as to induce* the defendant to do the act complained of, but not *with the intention of inducing* him to do that act, and further it was contradicted before being acted upon, so that, considering the statements altogether, no reasonable man would have acted upon the original representation as true: and that representation was on these grounds (either of which, according to the judgment, would have been sufficient) held not to be conclusive.

In *Cornish v. Abington*, 4 H. & N. 549, the rule with reference to estoppels of this class was laid down by Pollock, C.B., in very wide terms: "If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say that he is not bound, if another, so understanding it, has acted upon it. If any person, by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or licence—whether the party intends that he should do so or not—it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct." See also *Polak v. Everett*, 1 Q. B. D. 669; *Thomas v. Brown*, Id. 714.

Estoppel *in pais*.
General rules.

General rule,
per Pollock,
C.B.

Estoppel *in pais*.
General rules.

General rule as to questioning legality of act, *per* Lord Campbell.

General rule as to estoppel by negligence.

Per Wilde, B.

Qualification, *per* Blackburn, J.

In *Cairncross v. Lorimer*, 3 Macq. 827, Lord Campbell thus stated the general rule as to estoppels of this class, when the legality of the act assented to is in question: "The doctrine is found, I believe, in the laws of all civilised nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act he has so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct."

The following passage from the judgment of Wilde, B., in *Swan v. N. B. Australasian Co.*, 7 H. & N. 603, (see *post*, p. 838), with the comment on it of Blackburn, J., in the Exch. Cham., 2 H. & C. 175, contains, it is apprehended, a full and accurate statement of the general rule now acted upon with reference to *estoppels by negligence*, and of the limitations on that rule. "The rule of decision," said Wilde, B., "which I deduced from an examination of the authorities is this: That if a man has wilfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden as against them to deny that assertion. *That if he has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that state of facts did not exist.* In short and in popular language, a man is not permitted to charge the consequences of his own *fault* on others, and complain of that which he has himself brought about."

This passage should be qualified, Blackburn, J., thought, "by saying that the *neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy.*" See *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 32, *per* Cockburn, C.J.; *Baxendale v. Bennett*, 3 Q. B. D.

525, *per* Bramwell, L.J.; *Dickson v. Reuter's Telegraph Co.*, Estoppel in
 3 C. P. D. 1; *Hall v. West End Advance Co.*, C. & E. *pais.*
 161.

Referring with approval to *Swan v. N. B. Australasian Co.*, *supra*, the Court of Exch. said, in *Halifax Union v. Wheelwright*, L. R. 10 Ex. 183, 192: "It is perhaps only an application of one of those general principles which do not belong to the municipal law of any particular country, but which we cannot help giving effect to in the administration of justice, viz., that a man cannot take advantage of his own wrong, a man cannot complain of the consequence of his own default against a person who was misled by that default without any fault of his own."

Lastly, in *Carr v. L. & N. W. R. Co.*, L. R. 10 C. P. 307, Brett, L.J., delivering the judgment of the court, laid down the following as "recognised propositions of an estoppel *in pais* : One such proposition is, that if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

Recognised
 propositions
 of an estoppel
in pais.
Carr v. L. &
N. W. R. Co.

"Another recognised proposition seems to be, that if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

"And another proposition is, that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

"There is yet another proposition as to estoppel. If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and such culpable negligence has been the proximate cause of leading,

Estoppel *in pais*.
By statement.

and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist."

To create estoppel there must be prejudice.

To the above may be added the rule enunciated by James, L.J., in *Ex p. Adamson*, 8 Ch. D. 817: "Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something or to abstain from doing something by reason of what he had said or done, or omitted to say or do;" see *McKenzie v. British Linen Co.*, 6 App. Cas. 82, 109; and *Horsfall v. Halifax Bank*, 52 L. J. Ch. 599.

Instances of estoppel by statement.

To proceed now to cases in which the above doctrines have been applied:—First, as regards estoppels by statement, see, (in addition to *Freeman v. Cooke*, *supra*), *Cox v. Cannon*, 4 B. N. C. 453; *Howard v. Hudson*, 2 E. & B. 1; *Foster v. Mentor Life Ass. Co.*, 3 Id. 48; *Gurney v. Evans*, 3 H. & N. 122. In *Dunston v. Paterson*, 2 C. B. N. S. 495, a sheriff, having a writ to arrest A., arrested B., who represented that she was A., and it was held that, although B. might be estopped by her representation from suing the sheriff for the original taking, yet he could not on that account justify detaining her after notice that she was not really A. In *M'Cance v. L. & N. W. R. Co.*, 7 H. & N. 477, a person who had fraudulently misrepresented the value of some horses, in order to induce the company to carry them at a lower rate, was held to be estopped, in his action for their loss, from proving their real and greater value. In *Lebeau v. Gen. Steam Nav. Co.*, L. R. 8 C. P. 88, silk goods were delivered to a shipowner under a bill of lading describing them as "linen," but without any fraud; the captain, before signing the bill of lading, stamped on it the words "weight, value, and contents unknown." Less freight was payable for linen than for silk. The shipowner was held liable for the loss of the goods. Compare *Cox v. Bruce*, 18 Q. B. D. 147. In *Carr v. L. & N. W. R. Co.*, L. R. 10 C. P. 307, the plaintiff contended, in an action for non-delivery of goods, that the defendants were estopped from saying that they had never had possession of the goods, by their advice-note, in which by mistake they informed him that they had received the goods for him, and on the faith of which, as he alleged, he had sold the goods, with the result that he had to pay

Misrepresentation to sheriff, inducing him to arrest.

Fraudulent misstatement to carrier of value of goods.

Unintentional misstatement.

Carrier's mistake in advice note.

damages for not delivering them; but the court held that there was no such estoppel, within the rules laid down by them (cited *ante*, p. 827).

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Similarly, in *Farmeloe v. Bain*, 1 C. P. D. 445, an unpaid vendor was held not to be estopped from setting up his lien as against his vendee's assigns, by the form of undertaking to deliver which he had given to the vendee. In *Coventry v. G. E. R. Co.*, 11 Q. B. D. 776, however, the defendants who had issued two delivery orders, which on the face of them appeared to relate to distinct consignments, were held to be estopped from saying that they both related to one and the same consignment, as against persons who had advanced money on the faith of these orders. In *Seton v. Lafone*, 19 Q. B. D. 68, a warehouseman informed the plaintiff, whom he supposed to be interested in some goods, that he had them in hand, and on the faith of this representation the plaintiff bought the delivery warrant. In an action for wrongful conversion of the goods, the warehouseman was held to be estopped from saying that he had never had them in his possession.

Issue of two delivery orders.

Representation by warehouseman that he had goods.

In *Middleton v. Pollock*, 4 Ch. D. 49, the representatives of a deceased solicitor were held to be estopped, by his statements, from disputing that moneys which he had advanced on mortgage belonged to a client. In *Bickerton v. Walker*, 31 Ch. D. 151, a mortgagor was held to be estopped, by a receipt indorsed on the deed, from alleging, as against an assignee of the mortgage, that the amount stated in the receipt was not advanced.

Unless there is a special provision to the contrary, the statement in a bill of lading as to the quantity of goods shipped is only *primâ facie*, and not *conclusive*, evidence against the shipowner of the amount actually shipped; *Lishman v. Christie*, 19 Q. B. D. 333.

Statement in bill of lading.

In *Smith v. Kay*, 7 H. L. C. 750, the H. L. acted on the rule that if a person has practised a deception with the view to a particular end, which has been attained by it, he cannot be heard to deny its materiality; see *per* Lord Cairns, *Beattie v. Ebury*, L. R. 7 H. L. 102, citing *Cherry v. Colonial Bank of Australasia*, L. R. 3 P. C. 24.

Materiality.

If a person be under legal disability to contract, his statements cannot create a contract by estoppel; *Cannam v. Farmer*, 3 Exch. 698, where a married woman signed a

Statements by infants and *femes covertes*.

Estoppel *in pais*.

By statement.

How far statements personal to person who creates estoppel.

Misrepresentation must be of existing facts.

Jorden v. Money.

note as "widow;" see *White v. Greenish*, 11 C. B. N. S. 209; *Miller v. Blankley*, 38 L. T. 527.

The well-established rule that "estoppels bind parties and privies, but not strangers," applies to estoppels by statements. Therefore, although a judgment debtor be estopped by his statements from claiming his goods as against a third party, a sheriff who seizes the goods under a *fi. fa.* against the debtor, is not bound by the estoppel; *Richards v. Johnston*, 4 H. & N. 660; see *Richards v. Jenkins*, 18 Q. B. D. 451. As to statements concerning title to land not creating, by way of estoppel, an equitable charge on the land, see *Keate v. Phillips*, 18 Ch. D. 560.

Before leaving the subject of *estoppels by statements*, reference must be made to a case where an important limitation was put upon the above rule in *Pickard v. Sears*, *ante*, p. 824. In *Jorden v. Money*, 5 H. L. C. 185, the holder of a bond had repeatedly stated that she would not enforce it, and that she had abandoned her claim on it, and in consequence of these statements, and on the faith of them, her debtor entered into engagements with third persons. Afterwards, notwithstanding these statements, she took proceedings to compel payment of the bond, and it was held (Lord St. Leonards dissenting) that her claim might be enforced in a court of equity, notwithstanding her representations and the resulting acts of the debtor. This decision proceeded on the ground that to raise an equity in such a case "there must be a misrepresentation of *existing facts*, and not of a mere *intention*." "I believe," said Lord Cranworth, after citing Baron Parke's observations, in *Freeman v. Cooke*, on *Pickard v. Sears*, "that the rule of law which, as I have more than once said, is a rule founded upon perfectly good sense, and is intelligible to every capacity, is illustrated by what then fell from Baron Parke, as well and as accurately as in any of the cases on the subject. The question is, whether the evidence here shows that anything took place which brings the case within those authorities? I am clearly of opinion (as clearly as I can be, knowing that I am counter in this respect, certainly to an authority for which I feel a very great deference, namely, the Master of the Rolls, probably to the Lords Justices, and I have some reason to suppose, also to some at least of your lordships,) that it does not. I am bound to state my view of the case; *I think that that doctrine does not apply to a case where the representation is not a representation of a fact, but a statement of*

something which the party intends or does not intend to do. In the former case it is a contract, in the latter it is not." Lord Brougham, the only other law lord present, thought that in point of fact there had been no abandonment by the holder of the bond of her claim upon it, but he appears to have assented to Lord Cranworth's opinion on the question of law. This distinction between representations as to existing facts and as to intentions, was recognised in *Citizens' Bank v. First National Bank*, L. R. 6 H. L. 352, and in *Maddison v. Alderson*, 8 App. Cas. 467, 473. See also *ante*, p. 91.

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A singular extension of the doctrine in *Pickard v. Sears* was made in *Loffus v. Maw*, 32 L. J. Ch. 49, where an uncle induced his niece to act as his housekeeper by promising verbally that he would devise to her certain realty. He then made a will in her favour, but afterwards revoked it. In a suit brought by the niece after her uncle's death, Stuart, V.-C., held that he had no right to make this revocation, and that the trusts of the will must be performed. *Loffus v. Maw*, however, is not consistent with *Jorden v. Money*, and it was disapproved of in *Maddison v. Alderson*, 8 App. Cas. 467, 473.

The class of reported cases in which an estoppel by conduct has been, or been sought to be, established is a very numerous one. See the principle in *Pickard v. Sears*, affirmed in *Gregg v. Wells*, 10 A. & E. 90; *Coles v. Bank of England*, Id. 437 (a case which Blackburn, J., stated in *Swan v. N. B. Australasian Co.*, 2 H. & C. 182, to be in his opinion wrongly decided); also *Sandys v. Hodgson*, 10 A. & E. 472; *Stroud v. Stroud*, 7 M. & Gr. 417; *Downs v. Cooper*, 2 Q. B. 256; *Doe v. Groves*, 16 L. J. Q. B. 297.

Instances of
estoppel by
conduct.

That an owner does not, merely by leaving chattels or documents of title in the possession of another, create an estoppel against himself in favour of an innocent person taking them from that other, is well illustrated by the necessity which was found to exist for passing the Factors' Acts, in order to create in certain cases a statutory estoppel; see *per* Cockburn, C.J., in *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 32; and *per* Bramwell, B., in *Gabarron v. Kreeft*, L. R., 10 Ex. 274, 281, and compare the opinion of Blackburn, J., in *Hollins v. Fowler*, L. R. 7 H. L. 757. See notes to *Lickbarrow v. Mason*, *ante*, vol. i., p. 741 *et seq.*

Factors' Acts.

For cases where persons were held, or sought to be held, estopped by their conduct from disputing the fact of their being shareholders in companies, see *Sheffield R. Co. v. Woodcock*, 7 M. & W. 574; *Cheltenham R. Co. v. Daniel*,

Estoppel on
shareholders.

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pais.
By conduct.

2 Q. B. 281; *Hull Flax Co. v. Wellesley*, 6 H. & N. 38; *Bank of Hindustan v. Alison*, L. R. 6 C. P. 54, 222; *Campbell's Case*, 9 Ch. 1; *York Tramways Co. v. Willows*, 8 Q. B. D. 685; *Ex p. Harrison*, 69 L. T. 204. For cases where the converse proposition was sought to be established, viz., that a shareholder was estopped from saying that he had not parted with his shares, see *Swan v. N. B. Australasian Co.*, 2 H. & C. 175, and the cases discussed, *post*, pp. 835 *et seq.*, under the head of estoppel by negligence.

Estoppel on
companies.

If a statement of fact is made by a company, upon which a shareholder or intending shareholder might be expected to act and does *bonâ fide* act to his damage, as when a company issues a certificate stating that a person is entitled to shares, and bargains are made on the faith of it, the company is estopped from disputing the statement; see *Re Bahia R. Co.*, L. R. 3 Q. B. 584; *Hart v. Frontino Co.*, L. R. 5 Ex. 111; *Re Ottos Mines*, (1893) 1 Ch. 618; *Balkis Co. v. Tomkinson*, (1893) A. C. 396. See also *Simm v. Anglo-American Co.*, 5 Q. B. D. 188; *Foster v. Tyne Co.*, 63 L. J. Q. B. 50; and *Bishop v. Balkis Co.*, 25 Q. B. D. 512; cases where the company was held not to be estopped.

For cases where a company was held to be estopped from denying that shares were fully paid, see *Burkinshaw v. Nicolls*, 3 App. Cas. 1004; *Re Hall & Co.*, 37 Ch. D. 712; and *Parbury's Case*, (1896) 1 Ch. 100; and for cases where there was held to be no estoppel, see *Re London Celluloid Co.*, 39 Ch. D. 190; and *Re Eddystone Co.*, (1893) 3 Ch. 9, (*ante*, p. 807).

As to a company being estopped by the acts of its secretary or agent, see notes to *Pasley v. Freeman*, *ante*, p. 87. And as to estoppel where the acts are *ultra vires*, see notes to *Collins v. Blanter*, *ante*, vol. i., pp. 378 *et seq.*

Instruments
negotiable by
estoppel.

As to instruments becoming negotiable by estoppel, see notes to *Miller v. Race*, *ante*, vol. i., pp. 465, 466.

The following cases also fall rather within the rule as to *estoppel by conduct* than within that which relates to estoppel by statements.

Estoppel as
to patents.

The assignor of a patent who has sold it as valid, cannot, as between himself and the assignee, set up that the patent is void for want of novelty; *Walton v. Lavater*, 8 C. B. N. S. 162; see also *Lawes v. Purser*, 6 E. & B. 930. And if a patentee, in consideration of a royalty, grants to another a licence to use the patent, and the latter uses it, he cannot set up in answer to an action for the royalty that the invention was not new, or that the patentee was not the first

inventor; *Noton v. Brooks*, 7 H. & N. 499; and *Crossley v. Dixon*, 10 H. L. C. 293; see also *Clark v. Adie*, 2 App. Cas. 435, *per* Lord Blackburn; *Cropper v. Smith*, 10 Id. 249.

Estoppel in
pais.
By conduct.

As to a trustee in bankruptcy permitting the bankrupt to carry on business, see *Engelback v. Nixon*, L. R. 10 C. P. 645; *Wadling v. Oliphant*, 1 Q. B. D. 145; *Ex p. Ford*, 1 Ch. D. 521; *Cohen v. Mitchell*, 25 Q. B. D. 262; *Re Clark*, (1894) 2 Q. B. 393; *Re Clayton & Barclay*, (1895) 2 Ch. 212. That a vicar cannot divest himself of his public right and duties by his conduct, see *MacAllister v. Rochester*, 5 C. P. D. 194.

Trustee in
bankruptcy.

Vicar.

In *Bowes v. Foster*, 2 H. & N. 779, the plaintiff, being in difficulties, and afraid that execution would issue against his goods, agreed with a creditor to make a pretended sale of the goods to him. An invoice was therefore made out, and a receipt was given to the creditor for a sum therein described as the purchase-money of the goods, and possession was delivered to him. Afterwards the creditor sold the goods as his own, whereupon the plaintiff brought trover against him. It was held that no property passed by the fictitious sale, and that the owner of the goods was not estopped from showing the real nature of the transaction, and that no sale in fact had been made. This case is not easily reconcilable with *Alner v. George*, 1 Camp. 392, where Lord Ellenborough held that a receipt in full of all demands could not be explained by evidence showing that in reality no money had passed between the debtor and creditor, and that the transaction was a mere fraud for the purpose of imposing upon other creditors. But as to *Alner v. George*, see the observations made, *ante*, vol. i. p. 328, and the judgment of Mellish, L.J., in *Lee v. L. & Y. R. Co.*, 6 Ch. 527, 534. The decision in *Bowes v. Foster* was followed by the C. A. in *Taylor v. Bowers*, 1 Q. B. D. 291.

Pretended sale
of goods.

In *Holding v. Elliott*, 5 H. & N. 117, it was held that a person whose name appeared at the head of an invoice as the seller of goods, was not estopped from showing that the invoice was only made in this form for the convenience of the real parties to the contract.

Heading of
invoices.

See further upon the question of *estoppel by conduct*, *Haines v. East India Co.*, 11 Moore P. C. 39; *Lawes v. Purser*, 6 E. & B. 930; *Macfarlane v. Giannacopulo*, 3 H. & N. 860; *Piggott v. Stratton*, 29 L. J. Ch. 1; *Cave v. Mills*, 7 H. & N. 913; *Re Baxendale*, 11 C. B. N. S. 787; *Naef v. Mutter*, 12 Id. 816; *Ashby v. Day*, 33 W. R. 631; *Van*

Estoppel by
conduct.

Estoppel in
pais.

Estoppel by
accounts.

Warehouse-
men.
Woodley v.
Coventry.

Knights v.
Wiffen.

Henderson v.
Williams.

Hasselt v. Sack, 13 Moore P. C. 185, where it was held that the agents of a ship, who had in their accounts attributed moneys which they had actually received to the payment of disbursements made by them for several successive voyages, were estopped from afterwards appropriating these receipts to a previous agency account of the ship; and *Harris v. Truman*, 9 Q. B. D. 264, where a trustee in bankruptcy was held estopped from setting up a fraud or breach of trust on the part of the bankrupt.

In *Woodley v. Coventry*, 2 H. & C. 164, the defendants sold to A. part of the flour lying at their warehouse, no appropriation being however made of any specific barrels of the flour to A. A. afterwards resold a small portion of his purchase to the plaintiff, who took a delivery order for it to the defendants, who assented to the order, and made some deliveries under it. The plaintiff, acting on this assent, paid part of the price to A. A. having become bankrupt, without having paid for the flour, the defendants refused to continue the deliveries to his vendee. It was held (upon the authority of *Hawes v. Watson*, 2 B. & C. 540) that they were, by their conduct, estopped from disputing the title of A.'s vendee, and from alleging that there had been no distinct appropriation of any flour to the contract between them and A. To the same effect was the decision in *Knights v. Wiffen*, L. R. 5 Q. B. 660, a case very similar to *Woodley v. Coventry*, except that in *Knights v. Wiffen* the purchase-money had been paid before the presentation of the delivery order, and it was therefore contended that the purchaser had not altered his position in consequence of the warehouseman's conduct; but the court held that the assent by the warehouseman to hold for the purchaser was sufficient, and that the position of the latter was altered, inasmuch as he was induced to rest satisfied instead of taking active steps to recover his money. See, however, as to this case, *Simm v. Anglo-American Co.*, 5 Q. B. D. 188, 212, *per Brett, L.J.*

In *Henderson v. Williams*, (1895) 1 Q. B. 521, a merchant, who had goods in his name at the defendant's warehouse, was induced by the fraud of F. to authorise the defendant to hold the goods to F.'s order. F. then agreed to sell them to the plaintiffs, who, before paying the price, obtained a statement from the defendant that he held the goods to their order. The fraud of F. having been discovered, the defendant refused to deliver the goods to the

plaintiffs. It was held by the C. A. that the defendant was estopped from denying the plaintiffs' title to the goods.

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In *Trickett v. Tomlinson*, 13 C. B. N. S. 663, a person who had represented that he had authorised another to act for him, and to come to an amicable arrangement of a pending difference, was held, upon the same principle, to be estopped from repudiating an arrangement made by this third person, on the ground that he had exceeded his secret instructions.

Authority to settle differences.

In *Morris v. Bethell*, L. R. 5 C. P. 47, the defendant was sued as acceptor, his acceptance having been forged. He had previously paid an acceptance forged by the same person, and it was sought on that ground to hold him estopped from disputing his signature to that sued upon. The jury found that the acceptance to the bill declared on was not the defendant's signature, nor authorised nor adopted by him, that he did not know that the plaintiff had held the former forged bill, and that he did not lead the plaintiff to believe that the acceptance to the bill in question was his signature, or was authorised by him. The court held, as might have been expected, that there was no estoppel. Compare *McKenzie v. British Linen Co.*, 6 App. Cas. 82.

Payment of prior forged bill.
Morris v. Bethell.

In *Haddow v. Morton*, (1894) 1 Q. B. 95, 565, an execution creditor, who had succeeded in an interpleader issue and taken out of court the money deposited by the claimant as the value of the goods, was held to be estopped, in respect of the same judgment debt, from denying that as against himself the claimant was the owner of the goods.

Execution creditor.

Another head of estoppel, distinct in some respects from those above referred to, but falling properly within the class of estoppels by conduct, namely, *estoppel by negligence*, has been much considered in some modern cases. But it should be observed that the expression, though useful, is somewhat misleading. Mere carelessness where there is no breach of a duty to be careful creates no estoppel. In the words of Blackburn, J., in *Swan v. N. B. Australasian Co.*, 2 H. & C. 175, 181, cited with approval by Cockburn, C.J., in *Johnson v. Crédit Lyonnais Co.*, 3 C. P. D. 32, 42: "a person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself; but, inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently,

Estoppel by negligence.

What is negligence.

There must be neglect of duty.

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pais.

By negligence,

Young v.
Grote.

purchased those goods from the thief." See also *Arnold v. Cheque Bank*, 1 C. P. D. 578.

A case which has been often cited as an instance of estoppel by negligence, is *Young v. Grote*, 4 Bing. 253. There a man gave to his wife a cheque signed in blank for her to fill up according to her need. She filled it up for 50*l.*, but carelessly left a blank space which enabled the bearer to alter the 50*l.* into 350*l.*, and the banker, acting with ordinary care, paid the cheque as for 350*l.* The court held that the loss must fall upon the customer, because the banker "had been misled by want of proper caution on the part of his customer." See *post*, p. 839.

In *Bank of Ireland v. Evans' Charities*, 5 H. L. C. 389, *Young v. Grote* was recognised, but Parke, B., in delivering the opinion of the judges, pointed out that, in order to raise an estoppel in cases of this kind, the negligence complained of must be *negligence in, or immediately connected with, the transaction itself*.

Baxendale v.
Bennett.

In *Baxendale v. Bennett*, 3 Q. B. D. 525, the action was brought on a bill of exchange purporting to be drawn by W. C. on, and accepted by, the defendant. It was indorsed in blank by W. C., and also by H. T. C., from whom the plaintiff took it without notice of fraud, and for value. One Holmes had asked the defendant for his acceptance to an accommodation bill, and the defendant had written his name across a paper which had an impressed bill stamp on it, and had given it to Holmes to fill in his name, and then to use it for the purpose of raising money on it. Afterwards Holmes, not requiring accommodation, returned the paper to the defendant in the same state in which he received it from him. The defendant then put it into an unlocked drawer of his writing table at his chambers, to which his clerk, laundress, and other persons coming there, had access. He had never authorised W. C. or any person to fill up the paper with a drawer's name, and he believed that it must have been stolen from his chambers. On these facts, Lopes, J., found that the bill was stolen from the defendant's chambers, and the name of the drawer afterwards added without the defendant's authority; but that the defendant had so negligently dealt with the acceptance as to have facilitated the theft; he therefore ruled, upon the authority of *Young v. Grote* and *Ingham v. Primrose* (7 C. B. N. S. 82) that the defendant was liable.

The C. A. reversed the judgment; Bramwell, L.J., on the

ground that, admitting the defendant's negligence, in the sense of want of care, the "negligence was not the proximate or effective cause of the fraud: a crime was necessary for its completion;" whilst he distinguished *Young v. Grote*, on the ground that the drawer of the cheque had in that case "voluntarily parted with the instrument: it had not been got from him by the commission of a crime." Brett, L.J., whilst coming to the same conclusion, preferred to rest his judgment on the ground that "the defendant never authorised the bill to be filled in with a drawer's name, and he could not be sued upon it." He further expressed his opinion, that "the observations made by the lords in *Bank of Ireland v. Evans' Charity*, have shaken *Young v. Grote* as an authority."

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pais.

By negligence.

In *Coventry v. G. E. R. Co.*, 11 Q. B. D. 776, the C. A. held the defendants estopped as against the plaintiffs from disputing the existence of two parcels of wheat, the plaintiffs having been misled by a negligent issue of documents on the part of the defendants into the belief of the existence of two such parcels, and thereby induced to make advances to a third party accordingly; when in fact there was only one.

Coventry v.
G. E. R. Co.

Ex p. Swan, 7 C. B. N. S. 400, is the case usually referred to upon the question, which has not unfrequently arisen, whether a person who, from want of care or misplaced confidence, has permitted his securities to be stolen or improperly dealt with, is estopped from disputing the title or authority of the wrongdoer. In that case the judges of the Court of C. P. differed in opinion as to whether the rule acted on in *Young v. Grote* was applicable to Swan's case. He was a holder of shares in two joint-stock companies, and had (negligently, as it was alleged) handed to his agent some deeds of transfer of shares, executed in blank, intending that the deeds should be used for the transfer of shares in the first company, and the agent, having (through Swan's negligence, as it was also alleged) stolen from his box certificates of shares in the second company, had fraudulently filled up the deeds as transfers of the shares of that company, and handed them to *bonâ fide* purchasers. The second company had placed on their register the names of the purchasers, and Swan's application to the court was to compel them to replace his name. Erle, C.J., and Keating, J., thought, on the authority of cases mentioned above, that Swan had precluded himself by his negligence from asking for the equitable interference of the court. But Williams,

Ex parte
Swan.

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Swan v.
N. British
Australasian
Co.

Scholfield v.
Londes-
borough.

and Willes, JJ., refused to concur in that view, or to extend the decisions as to the effect of signing instruments in blank beyond cases of *negotiable instruments*.

The judges being thus equally divided, Swan's application failed, but he then made a similar application to the Court of Exch., which court directed that an action should be brought. He thereupon brought an action against the company for wrongfully removing his name from their register, *Swan v. N. B. Australasian Co.*, 7 H. & N. 603. The facts were fully stated in a special case, and Martin and Channell, BB., in judgments in which all the authorities on this question were reviewed, held that the transfers were void, and that there was no such negligence on Swan's part as estopped him from insisting that the property in the shares did not pass under them; and further, that the doctrine of estoppel by executing instruments in blank is confined to negotiable instruments, and does not apply to deeds. From this judgment Pollock, C.B., and Wilde, B., dissented, but the opinion of the junior judge was withdrawn, in order that the case might be carried to error, and judgment was given for Swan. This judgment was affirmed in the Exch. Cham., 2 H. & C. 175: all the judges present, except Keating, J., being of opinion that the transfers were void, and that there had been no such negligence on Swan's part as estopped him from showing that the shares did not pass under the transfers.

Young v. Grote was much considered in the C. A. in *Scholfield v. Londesborough*, (1895) 1 Q. B. 536. There a bill of exchange for 500*l.* was, after acceptance, fraudulently altered by the drawer into a bill for 3,500*l.* The stamp upon the bill was sufficient to cover the larger sum, and the bill, when accepted, had spaces on the face of it which enabled the alteration to be made. A *bonâ fide* holder for value sued the acceptor for the full amount of the bill as altered. Lord Esher and Rigby, L.J., held that the acceptor was not liable on the bill otherwise than according to its original tenour (see the Bills of Exchange Act, 1882, s. 64). They were of opinion that the acceptor of a bill owes no duty to any one taking the bill, other than the duty of paying on presentment, and therefore is not estopped, by any carelessness in accepting it in a particular form, from setting up a forgery; and further that the forgery, and not the carelessness, if there was any, was the proximate cause of the holder's loss. With regard to *Young v. Grote*, they con-

sidered that it is only supportable on the ground that by the law merchant any one who signs a blank cheque authorizes the person in whose hands it is to fill it up as his agent. From this judgment, Lopes, L.J., dissented, being of opinion that the acceptor of a bill does owe a duty to holders not to be guilty of negligence with reference to the form of the bill, and to take reasonable precautions against the possibility of fraudulent alterations; and that, in this particular case, the acceptor had not fulfilled that duty, and his breach of it was the proximate cause of the holder's loss. He considered *Young v. Grote* to be a binding authority. The judgment of the court was affirmed in the H. L.

Estoppel in
pais.
By negligence.

For further judicial references to *Young v. Grote*, see *Robarts v. Tucker*, 16 Q. B. 560, 579, per Parke, B.; *Bank of Ireland v. Evans' Charities*, 5 H. L. C. 389, 410, per Parke, B.; *Ex p. Swan*, 7 C. B. N. S. 400, per Erle, C.J., and Williams, J.; *Swan v. N. B. Australasian Co.*, 2 H. & C. 175, per Blackburn, J.; *Halifax Union v. Wheelwright*, L. R. 10 Ex. 183, 192; *Arnold v. Cheque Bank*, 1 C. P. D. 578, 586; *Merchants of the Staple v. Bank of England*, 21 Q. B. D. 160, 163, 172; *Vagliano v. Bank of England*, (1891) A. C. 107, 126, 136, 170.

Observations
on *Young v.*
Grote.

In the Exch. Cham., in *Swan v. N. B. Australasian Co.*, *supra*, the rule laid down in *Bank of Ireland v. Evans' Charities* (*ante*, p. 836), that negligence to operate as an estoppel must be the proximate cause of the loss, was fully recognised, as indeed it had been in the court below, where the judges differed only as to its application to the facts. See also *Arnold v. Cheque Bank*, 1 C. P. D. 578, 588; *Baxendale v. Bennett*, 3 Q. B. D. 525; *Merchants of the Staple v. Bank of England*, 21 Q. B. D. 160; *Seton v. Lafone*, 19 Q. B. D. 68; *Vagliano v. Bank of England*, 22 Q. B. D. 103, 23 Id. 243, (1891) A. C. 107; *Scholfield v. Londesborough*, (1895) 1 Q. B. 536.

The negli-
gence must be
proximate
cause of loss.

It also appears from the judgments that the Exch. Cham. in that case agreed with those judges in the court below who held that the doctrine of estoppel by executing instruments in blank, as acted upon in earlier cases, is confined to negotiable instruments, and does not apply to deeds.

Execution of
instruments
in blank.

Reference should also be made, on this subject, to *Tayler v. Great Indian Peninsular R. Co.*, 4 De G. & J. 559, where transfers had been executed by a principal in blank as to the particular shares, and the blanks had been afterwards fraudulently filled up by the broker with the description of

Tayler v.
G. I. P. Rail.
Co.

Estoppel *in pais*.

shares not intended to be transferred, and the L.JJ. held, confirming the decision of Wood, V.C., that the transfers were void, and that the original owner was entitled to have the shares delivered up to him; and to *Johnston v. Renton*, 9 Eq. 181. See also *Société Générale v. Walker*, 11 App. Cas. 20, 28; *Colonial Bank v. Cady*, 15 App. Cas. 267; *Powell v. London and Prov. Bank*, (1893) 2 Ch. 555; and notes to *Miller v. Race*, *ante*, vol. i., pp. 465—6, 472.

Estoppel limited to put the party misled in same position as if appearances true.

In the class of cases noticed above, the estoppel must obviously be limited within such bounds as are sufficient to put the party who has dealt on the faith of appearances that turn out to be incorrect in the same position with reference to the author of such appearances as if they were true. For instance, in cases like *George v. Clagett*, *ante*, p. 135, the principal is not estopped from saying that the person whom he allowed to appear to be the real principal was in fact an agent; if he were, he could not sue at all in his own name; but he is virtually estopped from denying that the agent had authority so to contract with the customer as to give him all the rights which he would have had if dealing with a principal. This limitation is analogous to that stated by Knight-Bruce, V.-C., in *Barrs v. Jackson*, *ante*, p. 760.

The truth is, that the courts have been, for some time, favourable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position. Such estoppels are still, as formerly, considered *odious*.

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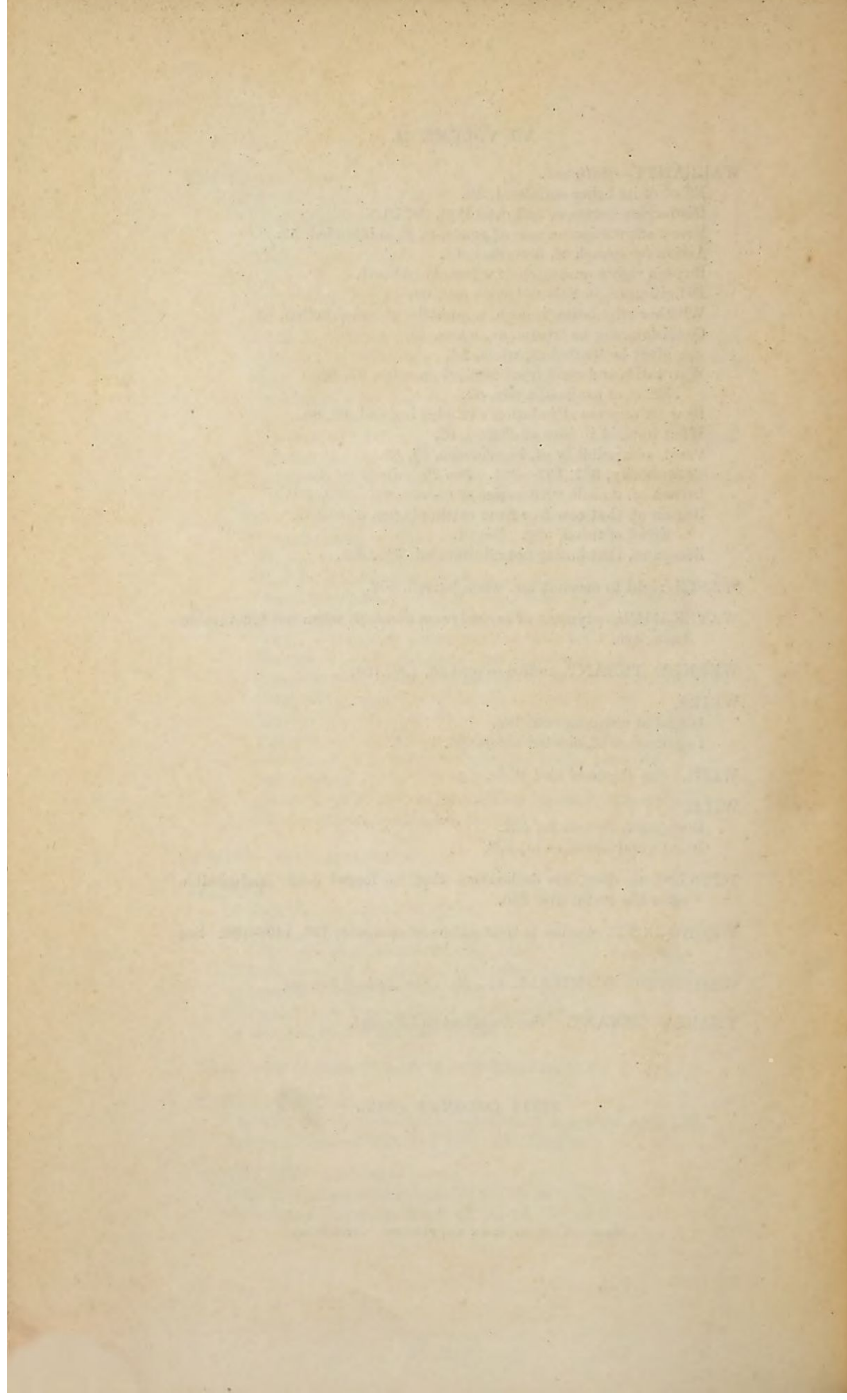
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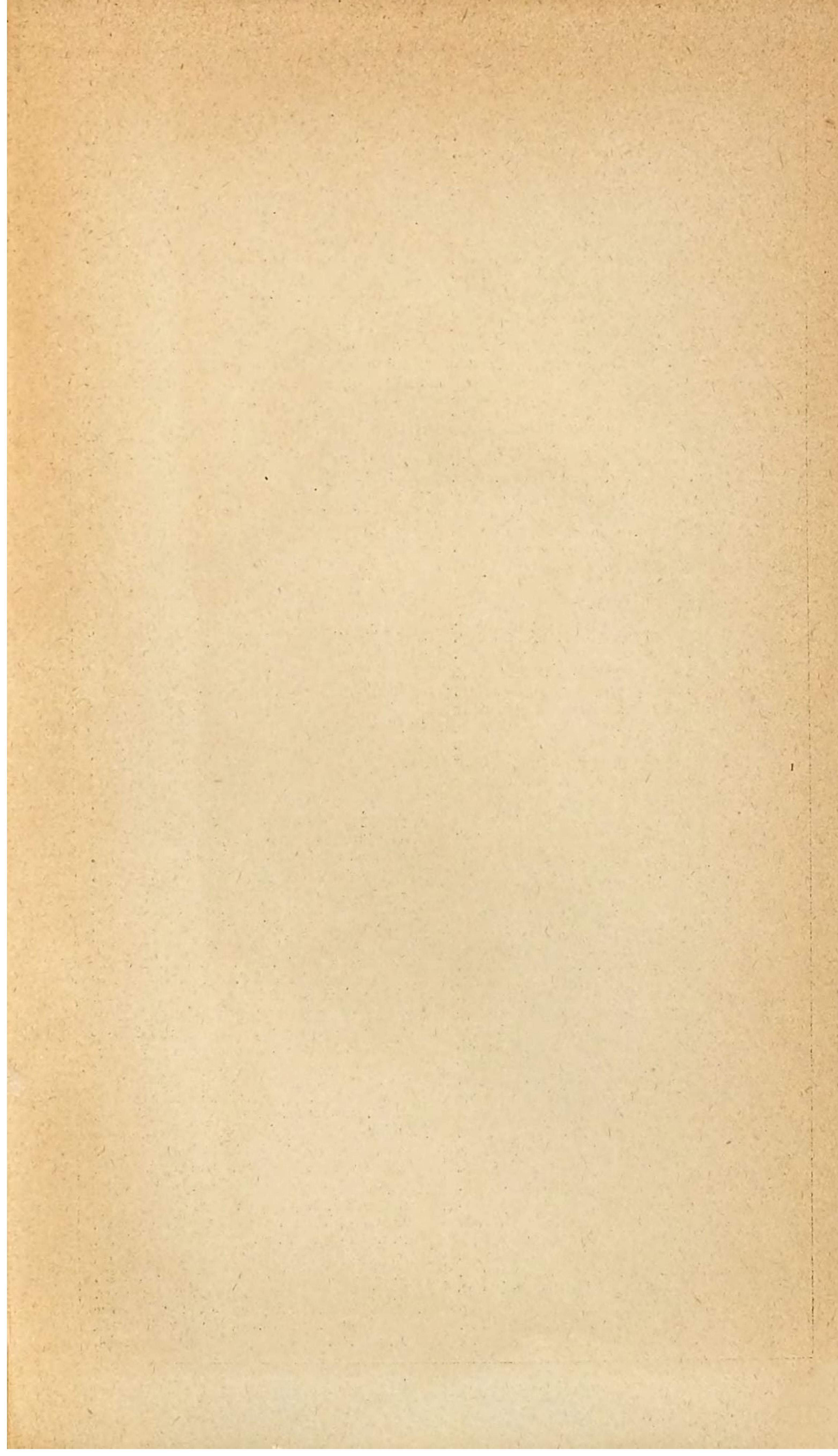
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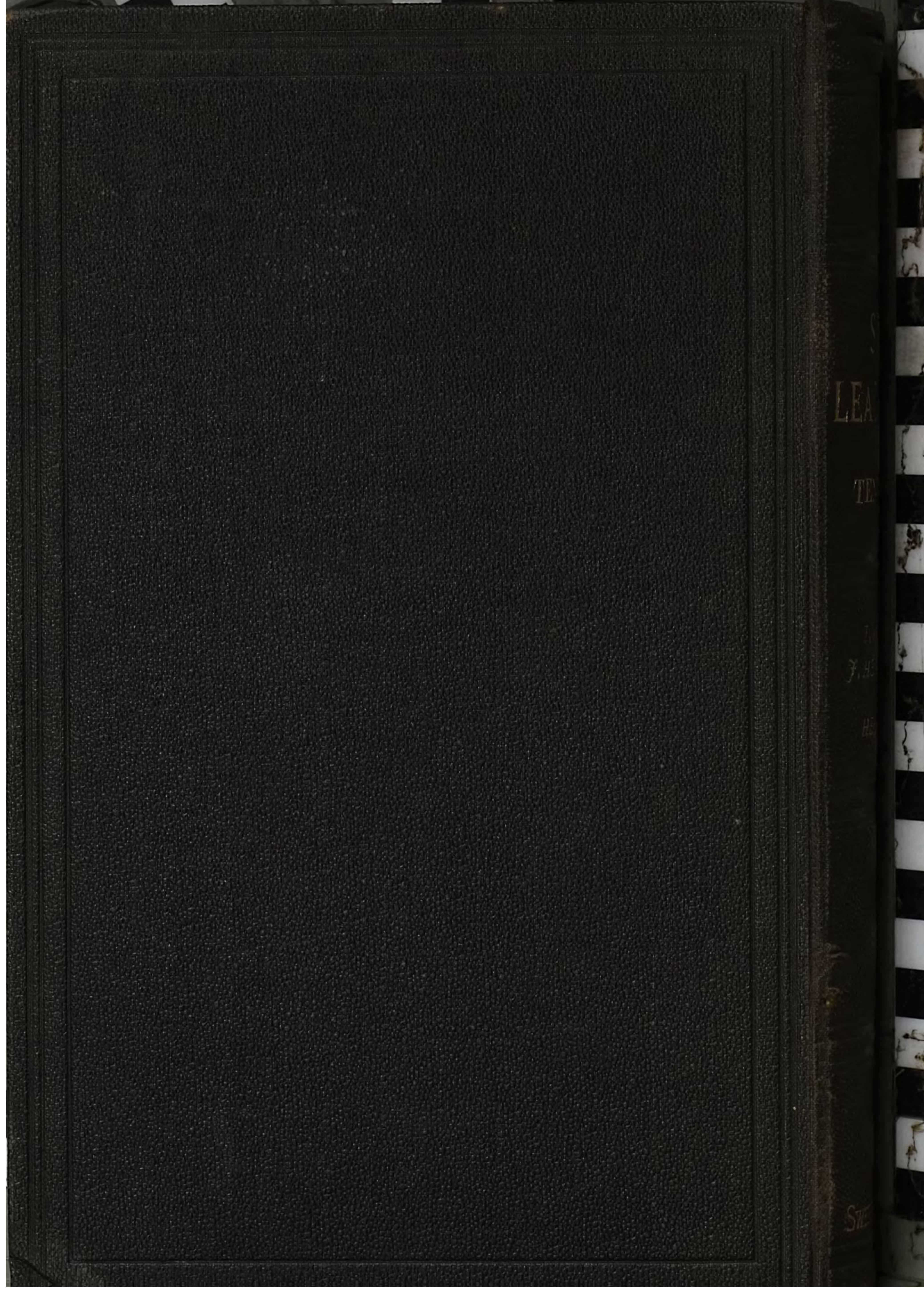
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